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COMMERCIAL LAW CASES

VOLUME ONE

PERRIN AND BABB

COMMERCIAL LAW CASES

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IN TWO VOLUMES

VOLUME ONE

CONTRACTS — SALES
AGENCY



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PREFACE

The object of this book is to furnish material which, in the hands of a competent instructor, shall be adequate for a two years' course in commercial law in institutions of collegiate rank. To this end, the authors have attempted to combine the advantages of the text book and case systems, and have attempted further to eliminate some of the disadvantages of each. The text presents to the student the fundamental principles of each subject in such form that he may appreciate the relation of the cases to each other and to the whole; the cases have been so summarized and abstracted as to reduce to a minimum the tedious verbiage upon which the student ordinarily wastes time.

In order to accomplish this result within a limited number of pages, the authors have been obliged to assume competent instruction, or, in its absence, such general familiarity with the subject matter by the student that he can appreciate what subjects have been exhaustively covered and what subjects are less completely represented. While the main topics in every branch treated have been at least touched upon, it has been necessary to confine within the scope of two volumes material which in the ordinary law school instruction requires at least twelve. Obviously, every branch of every subject cannot be completely set forth. With this difficulty in view, the authors have not lost sight of the main elements and fundamental principles, yet have been obliged to treat conflicts in minor rules as of secondary importance. More space and minuteness of detail have been given to the discussion of the law of contracts than to any other branch, since experience shows that a proportionately longer period devoted to the first and fundamental subject in commercial law results in a quicker and surer grasp of the derivative principles of subjects subsequently treated. The relative space occupied in this volume by the law of contracts represents to the authors' minds the relative time which should be spent upon that subject in any course on commercial law.

It may be thought that a text purporting to cover two years' work should comprise other branches of the law in addition to those here represented: Contracts, Sales, Agency, Negotiable Instruments, Partnership and Corporations. In teaching, it has become apparent that far better results are reached by confining

the instruction to these particular subjects with a few additional lectures by the instructor upon insurance, torts, bankruptcy, carriers and real property. Students who have attempted to study subjects in addition to the six included in this text are almost invariably found to have so broad a knowledge that it has no depth.

While the primary object of the book is, as has been said, to furnish a text for institutions of a certain standing, the authors believe that its usefulness will be by no means limited to this particular field. The business man who desires stronger meat than the necessarily incomplete works on commercial law now in the market, will, in the opinion of the authors, find this book a more satisfactory diet than the perusal of additional texts on commercial law. This statement is not intended as a criticism of these other works: it is merely a plain statement of the fact, apparent to every teacher, that it is impossible to cover the field in the limited space of one text book without generalizing at the expense of the particular exception in which the business man happens to be interested. So far as this book goes, it represents not only what the authors think about the law, but the actual law in the particular cases set forth.

The summaries of facts are entirely the work of the authors. All details not essential to the particular questions in issue have been eliminated, and facts bearing upon matters collateral to the excerpts have been disregarded. The holding of the court has been occasionally broadened to indicate the relation of the particular case to the subject in hand. The remainder of each case is the judgment of the court, omitting unnecessary discussion. In order to make these truncated judgments readable, the authors have been obliged to take some liberties with spelling, quotation marks, marks of omission, and punctuation generally. Omissions have not usually been indicated, and only quotations from text writers have been properly signified. This course the authors believe to be justified in the interest of legibility and concentration.

A few words may be in order concerning the use of the book in college classes: The authors believe that the best results will be obtained by assigning the text and cases for reading by the student before coming to class. The text material should be thoroughly learned by the student in order that he may be familiar with the subject matter when the instructor lectures upon it. The instructor may then analyze the facts and comment on the facts and the law contained in the cases, giving additional examples and illustrations of the rules involved, and amplifying the text to any extent that he considers advisable. It is too often true that a text book leaves little for the instructor to add to the

material there presented, and the course thereby becomes dry and uninteresting. This difficulty the authors have had in mind, and have purposely left large scope for the instructor's individual knowledge and point of view.

It may be considered that the book appears too large for classes which have a limited time at their disposal. This difficulty is more apparent than real, as it is feasible for the instructor to skip cases at will and thereby choose for himself only the more important ones. Furthermore, it is possible and very practicable to require no reading of the opinion of the court in many cases. While the book has been in preparation, the authors have been furnishing their classes with mimeographed statements of facts and holdings, with no opinion appended. This system has worked well and can be used to advantage even with the book in complete form by omitting the reading of the opinion. The course may be much shortened by the elimination of this requirement, and at the same time those students who desire to do additional work will have the material at hand.

The acknowledgment of the authors is due to Miss Bessie N. Page, instructor in History and Law in the College of Secretarial Science at Boston University, for her careful comparison of the text and for valuable suggestions concerning the subject matter.

Boston,
September 1, 1921.

H. L. P.
H. W. B.

TABLE OF ERRATA

VOLUME ONE

Page	Line	
404	14	Insert "his" before "employment"
405	9	Delete comma before parenthesis
408	5	Should read "Liability of Joint Principals"
423	30	"Plaintiff's," not "plaintiffs" "
448	36	"Sub agent," not "sub-agent"
457	41	"Defendant," not "defendants"
461	7	"Plaintiff," not "plaintiffs"
478	24	Should read, "It is not to be applied", etc.
470	32	Should read, " <i>qui facit per alium facit per se</i> "
480	31	"Plaintiffs'," not "plaintiff's"
480	33	"plaintiffs" instead of "defendants"
489	12	Lloyd's
492	21	"Applying this principle", etc.
503	10	"Plaintiffs'," not "plaintiff's"

TABLE OF CONTENTS

VOLUME ONE

	PAGE
PREFACE	v
INTRODUCTION	i
COMMERCIAL LAW	i
LEGAL RIGHTS	i
SOURCES OF LAW	2
COMMON LAW	2
EQUITY	3
STATUTE LAW	4
OTHER SOURCES	4
CANON LAW	4
CIVIL LAW	4
THE LAW MERCHANT	5
JURISDICTION	5
STATE COURTS	6
FEDERAL COURTS	7
CHAPTER I: Formation of Contracts	9
1. Express, Implied and Quasi Contracts	10
2. Implied Contracts	11
3. Implied Contracts: Necessity of Privity between Parties	12
4. Executory and Executed Contracts	13
5. Legal and Moral Obligation	13
I. AGREEMENT	15
A. Offers	
1. Offer and Acceptance by Conduct	16
2. Communication of Offer: Necessity of Knowledge of Offeree of Offer	16
3. Advertisements Distinguished from Offers	17
4. Uncompleted Negotiations	18
5. Indications of Intention	19
6. Vague Agreements	20
7. Notice of Revocation	21

	PAGE
8. Revocation by Death of Offerer	22
9. Sealed Offers. (Majority Rule)	23
10. Revocation of Offer to Public in Manner of Offer	23
11. Revocation by Lapse of Time	24
 <i>B. Acceptance</i>	
1. Communication of Acceptance	25
2. Acceptance by Act	26
3. When Acceptance Takes Place	28
4. Acceptance to Place Specified	29
5. Acceptance in Manner Implied	30
6. Necessity of Unconditional Acceptance	31
7. Termination of Offer by Counter-Offer	32
 II. FORM OF CONTRACTS	 33
<i>A. Sealed Instruments</i>	
1. Nature of a Seal	36
2. Delivery	37
3. Estoppel	37
4. Merger of Prior Simple Contract	38
5. Nature of Consideration Usually Immaterial at Law	39
6. Illegality or Immorality of Consideration of Sealed Contract	40
7. Nature of Consideration Material in Equity	41
 <i>B. Statute of Frauds</i>	
1. Promise by Executor or Administrator	42
2. Promise to Answer for Debt of Another	43
3. Promise to Debtor to Answer for His Debt	44
4. Contract Made on Credit of Promisor	45
5. Extinction of Original Debt	46
6. Promise for Benefit Received by Promisor from Creditor	47
7. Promise for Benefit Received by Promisor from Debtor	48
8. Promise upon Consideration of Marriage	49
9. Contracts for Sale of Interest in Land. (Majority Rule)	50
10. Contracts for Sale of Interest in Land. (Massachusetts Rule)	51
11. Contracts not to be Performed within a Year	52
12. Contracts which May be Performed within a Year by Death	52
13. Nature of Memorandum Required	54
14. Nature of Memorandum Required	55
15. Signature of Memorandum by Party to be Charged	55
16. Effect of Non-Compliance with the Statute	

	PAGE
III. CONSIDERATION	57
1. Nature of Consideration	59
2. Good and Valuable Consideration	60
3. Consideration in Sealed Instruments	61
4. Exchange of Even Values	61
5. Adequacy of Consideration in Equity	63
6. Forbearance	63
7. Part Payment of Debt not yet Due as Consideration	64
8. Part Payment: Effect of Voucher Check	66
9. Part Payment Accompanied by Other Benefit or Detri- ment	68
10. Compromise of Amount Due	68
11. Compositions with Creditors	69
12. Doing What One is Bound to Do	70
13. Promise of Additional Compensation. (General Rule)	71
14. Promise of Additional Compensation. (Conflicting Rule)	72
15. Additional Promise by Third Party	74
16. Conditional Consideration	75
17. Past Consideration	76
18. Moral Obligation as Past Consideration	77
19. Past Consideration in Case of Debt Discharged by Law	78
20. Consideration Part Past and Part Present	80
21. Privity to Consideration. (Majority Rule)	81
22. Privity to Consideration. (Minority Rule)	82
23. Subscriptions	84
IV. CAPACITY OF PARTIES	85
<i>A. Contracts of Infants.</i>	
1. Contracts of Infants in General	86
2. Contracts for Necessaries	87
3. Executory Contracts for Necessaries	88
4. Money as a Necessary	89
5. Contracts which an Infant may be Compelled by Law to Perform	90
6. Contracts of which an Infant has Enjoyed the Benefit	91
7. Conditions Under Which Infant May Rescind. (Ma- jority Rule)	92
8. Conditions Under Which Infant May Rescind. (Mi- nority Rule)	94
9. Ratification	95
10. Ratification by Lapse of Time	96
11. Ratification: Knowledge of Right of Rescission Imma- terial	97
12. Mere Acknowledgment Not Ratification	98
13. Statutory Requirement of Written Ratification	99

	PAGE
14. Appointment of Agent by Infant	100
15. Infant's Liability for Tort Distinguished	101
<i>B. Contracts of Insane Persons.</i>	
1. What Constitutes Inability to Contract	102
2. Liability of Insane Person for Necessaries	102
3. Knowledge of Insanity by Other Party Immaterial	104
4. Necessity of Return of Consideration on Disaffirmance. (Majority Rule)	105
5. a. Necessity of Return of Consideration on Disaffirmance. (Minority Rule)	106
b. Ratification	106
<i>C. Contracts of Married Women.</i>	
1. Common Law Disability	108
2. Contracts Between Husband and Wife	109
V. REALITY OF CONSENT	110
<i>A. Mistake.</i>	
1. No Mistake When Minds Meet	112
2. Failure of Minds to Meet	114
3. Effect of Unilateral Mistake	114
4. Mistake as to Nature of Transaction	115
5. Mistake as to Identity of Person	116
6. Mistake as to Identity of Person	116
7. Mistake as to Existence of Subject Matter	118
8. Mistake as to Identity of Subject Matter	119
9. Mistake as to Nature of Promise Known to Other Party	121
10. Mistake as to Value of Subject Matter	122
11. Mistake of Law	123
12. Mistake as to Law of Another Jurisdiction	124
<i>B. Misrepresentation and Fraud.</i>	
1. Innocent Misrepresentation in General	126
2. Misrepresentation a Term of the Contract	127
3. Misrepresentation a Ground of Relief in Equity	129
4. Misrepresentation by One in Confidential Relationship	130
5. Elements of Fraud	131
6. Promissory Misrepresentation of Fact	132
7. Misrepresentation of Intention as Fact	133
8. Misrepresentation by Concealment	134
9. Knowledge of Falsity	135
10. Intention that Other Party Act	136
11. Action by Other Party	137
12. Damage	138
13. Effect of Fraud	140

C. Duress and Undue Influence.

1. What Constitutes Duress	141
2. Threat of Lawful Act	143
3. Threat of Lawful Imprisonment	144
4. Duress of Goods	145
5. Ratification of Contract Obtained by Duress	146
6. Undue Influence	147
7. Effect of Undue Influence	148

VI. LEGALITY OF SUBJECT MATTER 151

1. Effect of Illegality	152
2. Agreement to Commit a Crime	153
3. Agreement to Commit a Private Wrong	154
4. Agreement to Violate Directory Statute not Void	155
5. Agreement to Violate Statute for Revenue Purposes Only Not Void	156
6. Agreement to Violate Statute: Sunday Contracts	157
7. Agreement to Violate Statute: Dealing in Futures	160
8. Agreement to Violate Statute: Bucket Shops	161
9. Agreement to Violate Statute: Lotteries	162
10. Agreement to Violate Statute: Usury	163
11. Agreement Against Public Policy: Influencing Official Action	164
12. Agreement Against Public Policy: Ousting Court of Jurisdiction	166
13. Agreement Against Public Policy: Secret Advantage in Composition with Creditors	167
14. Agreement Against Public Policy: Secret Advantage in Composition with Creditors. (Conflicting Rule)	168
15. Agreement Against Public Policy: Restraint of Trade	169
16. Effect of Partial Illegality	171
17. Effect of Partial Illegality	171
18. Effect of Withdrawal from Illegal Contract	173
19. Agreement in Violation of the Law of Another Jurisdic- tion	174

CHAPTER II: Operation and Discharge of Contracts 176

I. PARTIES TO CONTRACTS 176

A. Parties Privy to Contract.

1. Necessity of Privity	177
2. Right to Recover Money Had and Received	179
3. See Cases Under Chapter I, III, Consideration	179

B. Assignment.

1. In General	180
2. Assignment of Rights Not Yet in Existence	182

	PAGE
3. Assignment of Future Wages	183
4. Assignment of Contract Involving Personal Credit	184
5. Assignment of Part of Debt Due	186
6. Form of Assignment	187
7. Rights of Assignee after Notice to Debtor	187
8. Assignee Takes Subject to Equities against Assignor	188
9. Rights of Successive Assignees	189
10. Assignment by Death	191
11. Assignment by Bankruptcy	192
 <i>C. Joint and Several Contracts.</i>	
1. Intent to Make Joint or Several Contract	193
2. Suit Against Joint Contractors	194
3. Suits on Joint Contracts When Some of the Joint Contractors are Outside the Jurisdiction	195
4. Release of One Joint Debtor	196
5. Suit by Joint Contractors	197
6. Right of Joint Contractor to Contribution from the Others	198
II. CONSTRUCTION OF CONTRACTS	199
 <i>A. Legal Effect of Language.</i>	
1. Intent of Parties	200
2. Correction of Obvious Mistakes	201
3. Effect of General Words	203
4. Technical Words	204
5. Effect of Custom	205
6. Requisites of Valid Custom	207
7. Construction of Terms in Order to Give Contract Validity	208
8. Contract to be Construed Reasonably	209
9. Contracts to be Construed According to the Construction Placed Upon Them by the Parties	211
10. Inconsistent Written and Printed Provisions	212
11. Terms Implied in a Contract	213
12. Construction of Contracts as to Time	214
13. When Time is the Essence of the Contract	215
14. Time as the Essence of the Contract in Equity	217
 <i>B. Dependent and Independent Terms.</i>	
1. In General	218
2. Entire and Severable Contracts	220
3. Instalment Contracts	222
4. Tender of Performance as a Condition Precedent	224
5. Time of Delivery as Condition Precedent	225
6. Effect of Failure to Perform Condition Precedent	226

	PAGE
7. Mutually Dependent Conditions	227
8. Conditions Subsequent	228
9. Conditions Subsequent: See Cases Under Discharge by Agreement, III, A, <i>Infra</i>	229
III. DISCHARGE OF CONTRACTS	229
<i>A. Discharge by Agreement.</i>	
1. Waiver	231
2. Substitution of New Contract	232
3. Effect of Substitution of New Contract	233
4. Discharge by Condition Subsequent: Occurrence of Particular Event	235
5. Discharge by Condition Subsequent: Exercise of Option	236
6. Discharge by Condition Subsequent: Cancellation	237
7. Form of Discharge: Contracts under Seal	238
8. Form of Discharge: Contracts Within the Statute of Frauds	239
<i>B. Discharge by Performance.</i>	
1. What Constitutes Performance	241
2. Substantial Performance	242
3. Quantum Meruit	244
4. Quantum Meruit: Effect of Non-Compliance with Terms of Contract	245
5. Negotiable Instruments as Payment	247
6. Application of Payments on Account	248
7. Effect of Tender	249
<i>C. Discharge by Breach.</i>	
1. Anticipatory Breach	251
2. Damages for Breach During Course of Performance	252
3. Bankruptcy as Breach	253
4. Recovery of Penalty for Breach	254
<i>D. Discharge by Impossibility.</i>	
1. When Impossibility of Performance Operates as a Discharge	256
2. Impossibility Created by War	258
3. Discharge by Impossibility of Performance Arising from Destruction of the Subject Matter	260
4. Discharge by Subsequent Illegality	262
<i>E. Discharge by Operation of Law.</i>	
1. Merger	264
2. Alteration	265

3. Death	266
4. Bankruptcy	267

CHAPTER III: Sales 269

I. THE CONTRACT OF SALE 269

A. The Contract of Sale in General.

1. Definition	272
2. Sale and Contract to Sell Distinguished	274
3. Necessity of Agreement on Terms of Sale	275
4. What is Property	276
5. What are Goods	277
6. What is Price	278

B. Sales Distinguished from Similar Transactions.

1. License	279
2. Bailment and Conditional Sale	280
3. Return of Identical Goods in Bailment	282
4. Bailment of Goods Mixed with Other Goods	283
5. Bailment with Option to Buy	284
6. Conditional Sale	285
7. Pledge	287
8. Chattel Mortgage	288
9. Barter	289
10. Contract for Work, Labor and Materials	290

C. Statute of Frauds.

1. Application in General to Contracts of Sale	293
2. Nature of Memorandum Required	295
3. What the Memorandum Must Contain	296
4. What Constitutes Acceptance and Receipt	298
5. Constructive Acceptance and Receipt	300
6. Necessity of Act Indicative of Acceptance and Receipt	301
7. Acceptance Must be Under the Contract	302
8. Amount Received Not Material	303
9. What Constitutes Part Payment	304
10. Necessity of Actual Payment	305

II. WARRANTIES 306

1. Express and Implied Warranties	307
2. Dealers' Talk	308
3. Implied Warranty of Title	310
4. Implied Warranties of Quiet Enjoyment and Against Incumbrances	312
5. Sale by Inspection: Caveat Emptor	313

	PAGE
6. Sale by Inspection: Warranty When Seller is Manufacturer	314
7. Sale by Description: Warranty of Conformity to Description	316
8. Sale by Description: Warranty of Merchantability	317
9. Sale by Sample: What is Sale by Sample	318
10. Sale by Sample: Warranty of Correspondence to Sample	319
11. Sale by Sample: Warranty of Right of Inspection	320
12. Sale by Sample: Warranty against Defects not Apparent	321
13. Warranty of Fitness for Particular Purpose	322
14. Warranty of Fitness: Reason for the Rule	323
15. Warranties Annexed by Usage	324
III. TRANSFER OF PROPERTY BETWEEN BUYER AND SELLER	325
<i>A. When Title Passes.</i>	
1. Intent the Determining Factor	326
2. To What Goods Title May Pass	329
3. To What Goods Title May Pass: Mortgage of Stock in Trade	330
4. Goods Must be Ascertained and Appropriated to the Contract	331
5. Ascertained Goods Sold by Weight, Measure or Count	332
6. Sale of Goods from a Mass	333
7. Minority Requirement of Physical Separation	335
8. Selection by Buyer from Mass	336
9. Effect of Delivery to Common Carrier	338
10. Effect of Delivery to Carrier of Goods Agreed to be Delivered	339
11. Sales by Auction	340
12. Effect of Bill of Lading	342
13. Effect of Invoice	343
14. Effect of Transfer of Bill of Lading	345
15. Effect of Transfer of Warehouse Receipt	346
<i>B. Risk.</i>	
1. Goods at Risk of Owner	348
2. Risk on Buyer in Conditional Sale	349
<i>C. Rights of Innocent Purchaser from Seller not Having Title.</i>	
1. General Rule	349
2. Further Discussion of General Rule	352
3. Who are Bona Fide Purchasers	354
4. Estoppel to Assert Title	355
5. What Raises Estoppel	356

	PAGE
6. Sale by Thief	358
7. Sale by Fraudulent Vendee	359
<i>D. Rules Concerning Passing of Title Under Sales Act.</i>	
1. General Rules	360
2. Effect of Bill of Lading	361
3. Effect of Negotiable Document of Title	362
IV. RIGHTS OF THE PARTIES	364
<i>A. Unpaid Vendor's Lien.</i>	
1. In General	365
2. Lien on Expiration of Credit	367
3. Effect of Delivery of Negotiable Receipt on Lien	369
4. Lien not Applicable to Property After Purchaser has Changed its Character	371
5. Lien Unaffected by Judgment	372
<i>B. Stoppage in Transitu.</i>	
1. Of What the Right Consists	373
2. To What Carriage the Right Extends	373
3. Termination of Transit	375
4. Termination of Transit	376
5. Effect of Assignment of Bill of Lading	378
6. Right Not Lost by Wrongful Dispossession	379
<i>C. Rights Accruing Upon Breach of the Contract.</i>	
1. Rights of Seller in General	381
2. Right of Resale	382
3. Right to Resell Goods Stopped in Transit	382
4. Right of Carrier to Resell	385
5. Necessity of Tender before Resale	386
6. When Tender Must be Made	388
7. Right of Rescission	389
8. Right of Rescission for Breach of Warranty	391
9. Right to Sue for Price	392
10. Rules for Determination of Measure of Damages	393
11. Damages in Stock Transactions	395
12. Damages for Breach of Warranty	396
13. Damages for Breach of Warranty	398
14. Specific Performance	399
CHAPTER IV: Agency	401
I. RELATIONSHIP OF PRINCIPAL AND AGENT	401
<i>A. Relation in General.</i>	
1. Servants and Agents	404
2. Powers of Joint Agents	407

	PAGE
3. Liability of Joint Principals	408
4. Relationship by Agreement	409
5. Form of Authority: Parol Authority to Sign Written Instrument	410
6. Form of Authority to Give Sealed Instrument	411
7. Instrument Sealed by Agent in Presence of Principal	411
8. Authority of Agent to Fill Blanks in Sealed Instrument	412

B. Ratification.

1. Definition	414
2. What Constitutes Ratification	415
3. Necessity of Ratification or Disaffirmance	416
4. Consideration for Ratification Unnecessary	418
5. Form of Ratification	419
6. Form of Ratification of Sealed Contract	420
7. Necessity of Existence of Principal at Time of Act Ratified	421
8. Knowledge of Facts Necessary to Ratification	422
9. Ratification of Entire Contract Necessary	423
10. Intervening Rights of Third Parties	424
11. Right of Third Party to Withdraw before Ratification	425
12. Ratification of Criminal Act	426

C. Agency by Estoppel.

1. The Idea of Estoppel	428
2. To What Acts of the Agent Estoppel Extends	429
3. Estoppel to Assert Secret Limitations	430
4. Necessity of Misleading Third Person in Order to Create Estoppel	432
5. Right of Third Party to Rely on Apparent Authority	433
6. Principles of Estoppel Equally Applicable to General and Special Agents	434

D. Agency by Necessity.

1. What Constitutes Agency by Necessity	435
2. What is Necessity	437
3. Agency by Necessity of Wife	438

II. OPERATION OF AGENCY 440

A. Mutual Rights and Duties of Principal and Agent.

1. Duty of Principal to Compensate and Indemnify Agent	442
2. Rights of Servant Wrongfully Discharged	443
3. Duty of Care for Safety of Employees	444
4. Duty of Agent to Follow Instructions	446
5. Duty to Exercise Good Faith	447

	PAGE
6. Duty to Act in Person Unless Otherwise Authorized	448
7. Liability of Gratuitous Agent	450
<i>B. Ostensible Authority of Agent.</i>	
1. Agent to Sell: To Fix Terms of Sale	451
2. Agent to Sell: Warranty	452
3. Agent to Sell: To Receive Payment	453
4. Agent to Sell: Payment of Commission	453
5. Agent to Sell: Exchange	455
6. Agent to Sell: To Rescind Sale	455
7. Agent to Purchase	456
8. General Agent	457
9. Superintendent	458
10. Doctrine of Estoppel not Applicable to Public Agents	460
<i>C. Liability for Torts of Servant or Agent.</i>	
1. In General	461
2. Fraud Committed for Benefit of Agent	462
3. Wilful Torts of Servant	462
4. Servants for Whose Acts Master is Responsible	463
5. Deviation	465
6. Servant Loaned to Another	466
7. Liability for Act of Compulsory Employee	467
8. Independent Contractor	467
9. Torts of Public Servants	468
10. Torts of Agents of Charitable Organization	470
<i>D. Liability of Agent to Third Party.</i>	
1. In General	471
2. For Torts	472
3. Liability of Unauthorized Agent	474
4. Liability of Unauthorized Public Agent	475
III. UNDISCLOSED PRINCIPAL	476
<i>A. Liability of Undisclosed Principal.</i>	
1. In General	477
2. Effect of Refusal to Deal with Principal	480
3. Election to Hold Agent	480
4. Suit Upon Sealed Instrument	481
5. Suit Upon Negotiable Instrument	483
6. Effect of Disclosure of Principal in Negotiable Instru- ment	484
7. Effect of Clothing Agent with Indicia of Ownership	484
8. Effect of Factor's Acts	485

B. Liability of Third Person to Undisclosed Principal.

1. General Rule	488
2. Right to Assert Debt Due from Agent	489
3. Exclusive Credit Given to Agent	490
4. Contract Involving Financial Responsibility of Agent	491
5. Right of Third Party to Withdraw from Executory Contract	492

IV. TERMINATION OF AGENCY	493
1. Accomplishment of Purpose	494
2. Change in Subject Matter	495
3. Provision Against Termination by Change in Subject Matter	496
4. Death of Principal	497
5. Insanity of Principal	498
6. Revocation of Agency	500
7. Irrevocable Agency: Power Coupled with Interest	501
8. Irrevocable Agency: Power Coupled with Duty	503

TABLE OF CASES	505
--------------------------	-----

GLOSSARY,	523
---------------------	-----

COMMERCIAL LAW CASES

VOLUME ONE

COMMERCIAL LAW CASES

INTRODUCTION

COMMERCIAL LAW. Law, in the technical sense of the term, is the body of general rules regulating human conduct, recognized and enforced by public authority. Commercial law is that body of law which determines the rights and duties of persons engaged in commerce, manufacture, and trade. Its scope is bounded only by the limits of modern business enterprise, as no part of the field of law is entirely immaterial to some aspect of industry. Nevertheless, there are certain branches of law which are so specially related to business transactions and organization that they are commonly referred to as commercial law, as distinguished from other branches of law not so intimately concerned with trade. Hence, while complete knowledge of commercial law would necessitate familiarity with all law, it is usual to restrict the term to those subjects dealing with rights arising from contractual relations and from the particular forms of business activity through which those contractual rights are exercised. The field of law is divided into *substantive law*, which deals with legal rights and duties as such, and *adjective law*, which deals with the means of securing enforcement of those rights and duties in the courts. Commercial law belongs in the former category, and is limited to a consideration of legal principles. It is not concerned with methods of procedure.

LEGAL RIGHTS. The legal rights with which commercial law, as indeed all law, is concerned, may be divided into two broad classes: *Rights in rem*, rights in or against a thing itself, and *rights in personam*, rights against a person, without specific reference to any property in controversy. Rights in *rem* arise only in reference to ownership or possession of property, while rights in *personam* arise out of the infraction of legal duty. Every right, of whatever sort, carries with it a corresponding duty. If A has the right of title to goods, it follows that B has the duty to refrain from interfering with those goods of A. If A has the right to walk upon the highway without injury arising from the

recklessness of B, B has the duty so to use the highway that he shall not recklessly injure A. All substantive law deals with that obligation inherent in legal rights and duties which is imposed by the authority of the sovereign body that secures its enforcement.

Rights generally arise either *ex contractu*, out of some form of agreement, which is the basis of dealings between the parties, or *ex delicto*, out of a wrong of one party independent of agreement, or, in fact, of any privity between the parties. Contractual rights are the basis of the *law of contracts*, the corner-stone of the structure of commercial law, while rights arising from a wrong form the basis of the *law of torts*, a subject less directly connected with commercial law, although essential to a complete understanding of the subject.

SOURCES OF LAW. Laws, like customs, differ with individual states and races. As most of our customs are founded on those of England, so most of our law had its origin in the law of that country. Law has been well described as a crystallization of public opinion; it expresses in itself the ideas of justice, morality, and right dealing, inherent in the particular race or state which gives it authority. This being true, it follows that every great movement in the development of civilization has left its traces in the law, and that the sources of our law must be found in social and economic tendencies of the past. The chief of these sources are the following:

Common law. The common law of England, upon which our own common law is based, is that great body of unwritten law founded on immemorial usage and the general consent of the people, which began with customs of the Saxons and has been subject to steady development since their time. The earlier law of England, whether arising from usage or from statute, was a part of the inheritance of our Colonial ancestors and was, so far as compatible with conditions in the new country, brought intact by them into the New World. Later English decisions and developments are of value as analogy but are not controlling law, because both the legal and political systems of the two nations became distinct and independent as a result of the American Revolution.

The great difference between the common law, adopted in all English speaking countries, and the civil law of Continental Europe, which originated in the Roman law, grows out of the fact that the common law is unwritten and is therefore flexible. It adapts itself, often without conscious change, to new conditions as they arise. Such a body of unwritten law must, in order to have the stability indispensable to the foundation of a system under which men can live and act, be accompanied by

a certain rigidity of rule, to the end that individuals may appreciate their legal rights and duties in advance of action and may have a guide to conduct. This rigidity finds its place in our law in the determining force of precedent, the so-called doctrine of "stare decisis," the theory that previous decisions are to be followed in subsequent rulings of the court unless they are plainly wrong. This does not mean that the previous decision may not be overruled, but rather that it shall be regarded as the law until such time as it seems necessary to consider the previous case no longer appropriate in its application to the facts in hand.

In the early growth of the law, the doctrine of precedent was far more rigid than at the present time, and, as manifested in the enforcement of procedural forms in the common law courts of England, led to injustice which could be cured only by direct appeal to the residuary justice administered by the king in accordance with his conscience, rather than by the formal law of precedent applied in the courts. These appeals to the king came to be referred for decision to the council and later to the chancellor, who was the "keeper of the king's conscience" and who decided them in accordance with what he considered to be the conscience of the king.

Equity. The administration of such appeals was called equity, as distinguished from the common law. In it we find another source of law. The chancellor, who was not bound by legal doctrine any more than was the king in whose stead he made decisions, was enabled to exercise a greater amount of personal judgment than were the judges of the law courts. This judgment was necessarily affected by the habit of mind and by the training of the individual who gave it. The habit of mind was almost invariably that of a churchman, and the training was that of one versed in the Roman law, the basis of the ecclesiastic or canon law administered in the monasteries under their prerogative. It followed that certain principles of the Roman law were grafted upon the English law through the decisions of the chancellors; and as each chancellor, searching for a rule of decision in preference to abstract morality, inclined to follow judgments given in similar cases by his predecessors, there grew up in the equity courts a body of rules which in time became little less rigid than those of the law courts themselves.

This new body of law based upon the rulings of successive chancellors, affected as it was by their leaning toward the Roman law, came into conflict with the decisions of the law judges, and a struggle for precedence resulted. After long conflict between the courts, a division of authority gradually became recognized, so that thereafter the equity courts entertained jurisdiction over

certain classes of cases, while other cases were still retained and finally adjudicated in the law courts. This distinction remains until the present day, both in England and the United States; and equity retains jurisdiction over those cases in which there is fraud, breach of trust, hardship against which the common law affords no relief, or where the machinery of the common law is not adapted to do substantial justice between the parties. Some states have gone so far as to abolish all distinction between actions brought at law and in equity, resting each case upon equitable or purely legal principles, as the facts may warrant. Most states, however, still adhere to the different forms of pleading in the two classes of cases, although a given court may have jurisdiction over both law and equity matters. Only a very few states still have different judges for the two kinds of suits.

Statute law. In addition to the unwritten law, a great and ever-changing source of law is to be found in the enactment of rules of conduct by the legislative authority of the sovereign power, bound by no precedent or authority other than that of its own constitution, which itself can be changed by the proper procedure. In England, the legislative body is Parliament; in the United States, Congress and the legislatures of the several states. Legislative bodies are constantly enacting new laws to correct defects in existing law and to conform to the progress of the community. These statutes, written laws, supersede the common law when the two come into conflict, but otherwise leave it in full force and effect. Some states, for example New York, have gone so far as to attempt codification of the entire common law and to re-enact it by means of statute law. Such codes, however, have not come into general use and it seems unlikely that the attempt will be further extended.

Other sources. While the common law, the rules of equity, and statute law are the main bases of our law, there are certain other sources of law which have had a more or less direct effect upon it:

A. *The Canon Law.* The ecclesiastical, or canon law, the law of the Church, first of Rome and then of England, as developed from the Roman law, formerly regulated those rights and duties which were deemed to be especially within the sphere of spiritual authority. The leading example of this type of case is that of marital relations, until comparatively recently heard and determined in England by the spiritual courts.

B. *Civil Law.* The civil law is that great body of written law in effect on the continent of Europe, originating in the Roman law, and coming from the Roman law by various channels, generally direct, into the modern European law. These principles

find chief expression in our law of admiralty, the law of maritime affairs, which was long regulated by a special court nominated originally by the merchants for the settlement of disputes arising in such matters. While the civil law is not recognized by the American law as a direct source, it has left its impress not only on admiralty law but also on the law of those states, such as Florida and Louisiana, which were originally under Spanish and French control, and were subject to the civil law itself.

C. *The Law Merchant.* The law merchant rests upon a body of principles found by English traders to exist upon the Continent in the Middle Ages and adopted by them as better suited to commercial usages than many of the rules of the English common law. This law was for a time enforced only by action of the merchants themselves, but in early modern times, it was brought into the common law, recognized as a system of valid mercantile customs, and enforced by the common law courts. The law of bills, notes, and checks is a direct outgrowth from the law merchant based upon the idea of negotiability, an idea diametrically opposed to the English common law idea that only those persons who are direct parties to a contract can acquire rights under it.

JURISDICTION. In England, the source of all legal authority is a single sovereign, while in the United States we live under a divided sovereignty and are subject both to the laws of the states and of the United States. When the thirteen colonies declared their independence of the mother country, they renounced all allegiance to that sovereign and themselves assumed the attributes of sovereignty, that authority which owes allegiance to no other and is bound by no duties other than those of international law. During the war of the Revolution there were, then, thirteen separate and distinct sovereigns, each of them autonomous and acting in concert with the others only as its interests might appear best served by so doing. After the exigencies of war had passed, it became evident that thirteen separate sovereigns, each with its own system of taxation, currency and tariff, could not have that unity of purpose which was by all conceded to be desirable. For that reason, by the adoption of the Constitution, each of the thirteen states gave up a portion of its sovereignty to the central federal government, reserving to itself those attributes which were not expressly or impliedly granted under the terms of the Constitution of the United States of America. From this it follows that a citizen of the United States of America owes allegiance to two sovereigns: First, to the United States of America, in respect to those attributes of sovereignty granted to the federal government by the states, and,

second, to the particular state of which he may be a citizen. Persons within the borders of the United States, whether citizens or not, are subject to the laws of the United States of America, in so far as those laws may be material, and to those of the states so far as all other obligations are concerned. In passing, it is well to note that there is, strictly speaking, no common law of the United States. All powers of the federal government are derived from the Constitution, which is really an authority given by the states to the central government to legislate concerning certain specified subjects, and those only. Until such time as Congress acts, the states retain their previous control. As jurisdiction by the central authority can be acquired, then, only by legislation, all federal law must be statutory, and while the common law may aid in its interpretation, no direct sanction can be found in any source other than the Constitution and the acts of Congress.

State Courts. The courts of any state may be broadly divided into three classes: 1. Inferior Courts. 2. Superior Courts. 3. Supreme Courts.

The inferior courts, consisting of a judge sitting without a jury, have jurisdiction over small crimes and the smaller civil actions. From them, an appeal almost invariably lies both on questions of law and fact to the Superior Court, sitting in the county in which the action was brought. It is here that the more important cases are originally brought; that a jury trial is had if claimed by either of the parties; and that most questions of fact are finally determined. Of equal dignity and power, often as a part of the Superior Court, are the courts of Equity, the Probate Court, and, in some states, the Land Court. The Equity Court in most jurisdictions is now a part of the Superior Court and the same judges sit one term at law and another term in equity. Though a jury may be granted in the discretion of the judge, there is no right of trial by jury in the Equity Court, a principle which necessarily follows from the historical development of equity jurisdiction, originally based upon an appeal to the king. Probate Courts have jurisdiction over matters concerning the estates of deceased persons and often, to a certain extent, over domestic relations. Land Courts are established in those states which have a system of registration of land, and have jurisdiction over matters pertaining to such registration. From courts of superior jurisdiction, questions of law may be taken to the Supreme Court, which is the final arbiter on matters of law, and which may have original jurisdiction in the larger civil cases, both at law and in equity. Questions of law are brought to the Supreme Court by means of exceptions taken at the trial in

the Superior Court or by means of appeal. From the Supreme Court of the state, there is no appeal except on questions involving the Constitution of the United States. These cases may be taken to the Supreme Court of the United States.

This arrangement of courts is in effect in all states, although the nomenclature may differ. For example, in New York, the Supreme Court corresponds to what has been here designated as the Superior Court, and the Court of Appeals to the Supreme Court.

Federal Courts. The courts of the United States are empowered to hear cases arising under the Constitution, laws and treaties of the United States; they may also take jurisdiction over controversies between states, and between citizens of different states. They are composed as follows: The District Court, the lowest federal court, corresponds to the Superior Court in the state, and has jurisdiction over a district, generally state-wide except in the larger states. It sits both at law and in equity and is the final court of fact. It is also a Bankruptcy Court, having jurisdiction over cases arising under the bankruptcy law of the United States. From the District Court, lies an appeal on questions of law to the Circuit Court of Appeals, made up of judges chosen from several districts, sitting to review matters of law but not of fact. From the Circuit Court of Appeals, in turn, there is an appeal on certain questions of law to the Supreme Court of the United States, sitting at Washington, and composed of a Chief Justice and eight Associate Justices. This court has original jurisdiction over proceedings brought against foreign representatives, and controversies of a civil nature to which a state is a party. It has appellate jurisdiction on matters of law in cases which involve the jurisdiction of the court below, conviction for a capital crime against the United States, or the construction or application of the United States Constitution.

Chapter I.

FORMATION OF CONTRACTS.

A contract is an agreement resulting in an obligation enforceable by law. Agreement is assent regarding something to be done or forbore by one person for another. It is reached when the parties express their mutual assent to be bound and entitled by its terms. It may be express, when the parties actually state the terms to each other; implied, when, without specifying all the terms, they indicate by their conduct a common intention to contract; or quasi contractual, when the agreement is imposed by law without the assent of parties, as, for example, when they are unwilling to agree, or incapable of so doing.

The obligation of a contract consists in the right of one party to require the other to perform, and the duty of that other to perform accordingly. A legal obligation, as distinguished from a moral obligation, which may or may not be a legal obligation as well, is one enforceable by law. To summarize in anticipation the elements necessary to enforceability, a contract must satisfy the following requirements:

1. An agreement of the parties.
2. Proper form.
3. Consideration.
4. Contractual capacity.
5. Real consent to its terms.
6. A legal object.

These will be considered in order.

A contract is executory when something remains to be done by one or all the parties to it; it is executed when nothing remains to be done by any party. An executory contract, then, becomes an executed contract on fulfilment of the obligation of all parties. Contracts are often said to be unilateral or bilateral. Strictly speaking, a unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed. A bilateral contract consists solely of mutual promises to do some future acts, the promise of one party being given for the promise of the other.

1. Express, Implied and Quasi Contracts.

Highway Commissioners v. The City of Bloomington. 253 Ill. 164.

The Board of Highway Commissioners sues the city to obtain the amount of taxes collected by the city under a statute subsequently held unconstitutional. This amount, which should properly have gone to the Board, the city tries to retain on the ground that there was no contract between the Board and the city.

Held, that the Commissioners could recover on the theory that when one person has money or other property in his hands which he ought to deliver to the owner, no contract is required other than that implied in law.

Vickers, J.

As ordinarily understood, the only difference between an express contract and an implied contract is, that in the former the parties arrive at their agreement by words, either oral or written, sealed or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. In both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of the evidence necessary to establish it. A familiar illustration of an implied contract is, where one person, in the absence of any express agreement, renders valuable services to another which are knowingly accepted by such other, the law will imply a promise to pay a fair and reasonable compensation for such services. If an attorney renders services without any express agreement as to the amount of compensation to be received, the law implies a promise to pay him reasonable compensation for the work done. These illustrations are examples of genuine implied contracts, in all of which there is some act or line of conduct as a basis for the implication and which furnish the necessary privity to support the action. This class of implied contracts is sometimes called contracts implied as of fact. After subtracting express contracts and contracts implied in fact, there is still left another large class of obligations. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil law. This obligation was under the civil law designated *quasi-contractus*. Stated as a civil law principle, it was "an obligation similar in character to that of a contract, but which arises not from an agreement of parties but from some relation between them or from a voluntary act of one of them, or, stated in other language, an obligation springing from voluntary and lawful acts of parties in the absence of any agreement." In *quasi* contracts the obligation arises not from consent, as in a case of contracts, but from the law or natural equity. The term was not found in the common law, but it has been taken by writers upon the common law from the Roman law and may be considered now as quite domesticated.

The class of obligations now under consideration, and which are treated in works on contracts as "contracts implied in law," or *quasi* contracts, are recognized and enforced by common law courts. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases "the duty defines the contract." The action is in form *ex contractu*, but the alleged contract being purely fictitious, the right to recover does not depend upon any principles of privity of contract between the plaintiff and the defendant and no privity is necessary. The right to recover is governed by principles of equity although the action is at law. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex æquo et bono* belongs to another.

2. Implied Contracts.

Day v. Caton. 119 Mass. 513.

Day built a brick party wall upon and between adjoining estates, one of which he owned, and the other of which Caton, the defendant, owned. They had had no conversation about the wall, but the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it. Caton had reason to know that the plaintiff was acting with that expectation and allowed him thus to act without objection. The plaintiff sues to recover one-half of its value.

Held, that the plaintiff may recover upon the theory of an implied contract.

Devens, J.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. It must be shown that, in some manner, the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. And when one stands by in silence and sees

valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

If silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak.

The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury.

3. Implied Contracts; Necessity of Privity Between Parties.

Boston Ice Co. v. Potter. 123 Mass. 28.

Potter took ice from the Boston Ice Company, but on account of some dissatisfaction with the manner of supply, terminated his contract and took ice from the Citizens' Ice Company. The Citizens' Ice Company thereafter sold its business to the Boston Ice Company, which left ice every day with Potter. Potter knew nothing of the change in ownership of the business and supposed that he was getting ice from the Citizens' Ice Company. Upon his refusal to pay the Boston Ice Company for the ice left by it, the Boston Ice Company sues to recover the price of the ice delivered.

Held, that in order to recover, the plaintiff must show some contract with the defendant. There was no express contract, and upon the facts no contract with him was implied.

Endicott, J.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff

failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered, a contract would be implied.

4. Executory and Executed Contracts.

Fletcher v. Peck. 6 Cranch (U. S.) 87.

The state of Georgia passed an act authorizing the governor to sell certain unappropriated state territory. This act was subsequently repealed and declared null and void. In the meantime, Fletcher had become possessed of certain land under the legislative act by purchase from Peck, the original grantee. He now sues for breach of Peck's covenant that he gave a good title.

Held, that under the Federal Constitution no state may pass a law impairing the obligation of contracts, which would result, were the repealing act constitutional; and that therefore Fletcher has a good title.

Marshall, C. J.

Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

5. Legal and Moral Obligation.

Mills v. Wyman. 3 Pick. (Mass.) 207.

Wyman's adult son, who had ceased to be a member of his family, was taken sick on his return from a sea voyage and was boarded and nursed by the plaintiff, Mills. The defendant,

Wyman, subsequently wrote a letter to the plaintiff promising to pay for these expenses.

Held, that there was here no obligation beyond a moral obligation.

Parker, C. J.

The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises found on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises, therefore, have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligation to the interior forum, as the tribunal of conscience has been aptly called.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him

who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application to cases where at some time or other a good or valuable consideration has existed.

I.

AGREEMENT.

An agreement is usually reached by an offer of one party and an acceptance by the other. The offer may consist of a promise or an act. The acceptance may be made by the giving of a promise, by the doing of an act, or, in a few cases, by simple assent.

The offer must be communicated by words or conduct; it must contemplate the formation of a legal relationship, and must be more than an advertisement, offer to deal, or step in uncompleted negotiations. It may be made to a definite person or to one of a class of persons, but no contract will result until it has been accepted by a definite person with knowledge of the offer. The offer itself must also be definite. An offer may be revoked at any time before it has been accepted, unless the offer is under seal. Revocation takes effect when notice of the revocation reaches the offeree. Death of the offerer prior to acceptance revokes that offer. The offer will lapse without notice of revocation, when the time specified has passed, on rejection of the offer, or within a reasonable time.

The acceptance must ordinarily be communicated unless the offer contemplates the performance of, or forbearance from, an act, in which case the performance or forbearance may itself be the acceptance. Such an act or forbearance must be the one contemplated by the offerer and must indicate unambiguous acceptance by the offeree. Acceptance by silence can be made only in the case of sealed contracts or when the relationship of the parties is such that silence may properly imply consent. Acceptance takes effect when the acceptor puts notice thereof beyond his own control, unless the terms of the offer require receipt of notice of acceptance. The manner of acceptance may be defined by the offer; otherwise the express or implied intent of the parties will govern. The acceptance must be absolute and unconditional; identical with the terms of the offer; within the time contemplated; and must not be a counter-offer.

*A. Offers.***1. Offer and Acceptance by Conduct.***Austin v. Burge. 156 Mo. App. 286.*

The plaintiff, Austin, was the publisher of a newspaper which he sent to the defendant, Burge, for two years, the subscription being paid by the defendant's father-in-law. Austin continued to send the paper to the defendant for several years more. On two occasions, Burge paid a bill presented for the subscription price, but each time directed that the paper be stopped. Notwithstanding this order, the plaintiff continued to send the paper to him and he continued to receive and read it.

Held, that a contract was formed between the parties by their conduct, the act of sending the paper being the offer, and the receipt and use of it the acceptance.

Ellison, J.

It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that in relation to other things which have not been made the subject of an express agreement. Thus, one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet the plaintiff continued to send it and he continued to take it from the post office to his home. This was an acceptance and use of the property, and there being no pretense that a gratuity was intended, an obligation arose to pay for it.

2. Communication of Offer: Necessity of Knowledge of Offeree of Offer.*Broadnax v. Ledbetter. 100 Tex. 375.*

Ledbetter, the sheriff of Dallas County, offered a reward for the re-capture of an escaped convict. Broadnax captured the prisoner and returned him to custody, having no knowledge of the reward. He later sues to recover the amount of the reward.

Held, that notice or knowledge of the offer of the reward, when the re-capture was made, was essential to the plaintiff's right to recover.

Williams, A. J.

The liability for a reward of this kind must be created, if at all, by contract. There is no rule of law which imposes it except that which enforces contracts voluntarily entered into. A mere offer or promise to pay does not give rise to a contract. That requires the assent or meeting of two minds and therefore is not complete until the offer is accepted. Such an offer as that alleged may be accepted by anyone who performs the service called for, when the acceptor knows that it has been made and acts in performance of it, but not otherwise. He may do such things as are specified in the offer, but, in so doing, does not act in performance of it and therefore does not accept it, when he is ignorant of its having been made. There is no such mutual agreement of minds as is essential to a contract. The offer is made to anyone who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of specified things without reference to the offer is not the consideration for which it calls. This is the theory of the authorities which we regard as sound.

Reasons have been put forward of a supposed public policy, assuming that persons will be stimulated by the enforcement of offers of rewards in such cases to aid in the detection of crime and the arrest and punishment of criminals. But, aside from the fact that the principles of law to be laid down cannot on any sound system of reasoning be restricted to offers made for such purposes, it is difficult to see how the activities of people can be excited by offers of rewards of which they know nothing. If this reason had foundation in fact, it would hardly justify the courts in requiring private citizens to minister to the supposed public policy by paying rewards, merely because they have made offers to pay upon which no one had acted. Courts can only enforce liabilities which have in some way been fixed by the law. While we have seen no distinction suggested, it may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of a contract. But the liability of the individual citizen must arise from a contract binding him to pay.

3. Advertisements Distinguished from Offers.

Moulton v. Kershaw. 59 Wis. 316.

Kershaw & Son wrote to Moulton: "We are authorized to offer Michigan Fine Salt, in full car load lots of 80-95 barrels," on certain terms. Moulton replied, "You may ship me 2,000 barrels Michigan Fine Salt as offered in your letter." He now seeks to enforce the contract.

Held, that the language of the letter was that of an advertisement, and not of an offer.

Taylor, J.

If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent, we will sell you all the Michigan Fine Salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount.

We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "We are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language proper to be addressed generally to those who are interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order.

4. Uncompleted Negotiations.

Mayer v. McCreery. 119 N. Y. 434.

Mayer wrote to the defendant, McCreery, "I will take your building, 483 Fifth Avenue, on a twenty-one years' lease from May 1, 1895, to be altered by you similar to one Hume & Co. is now altering, and floors, etc., arranged as spoken about, etc., at the yearly rent of \$5,250 for each year of the term, net rent, no taxes, assessments, etc. Plans, etc., to be mutually agreed upon."

McCreery replied, "I hereby accept your offer." Four days later he wrote to Mayer, "The proposed lease cannot and will not be made." Mayer now seeks to enforce the agreement.

Held, that no contract was formed by these negotiations.

Peckham, J.

It is, in substance, an agreement that if the parties shall thereafter agree upon plans for the alteration of the building, that thereupon a lease of the building upon the terms specified in the letters will be given by the defendant to the plaintiff. The whole language is conditional; the making of the lease is plainly based upon the condition that an agreement shall be arrived at between the parties as to the plans and scope of the alterations which are to be thereafter made by the defendant. It is conceded that no such agreement was ever made. We think it was entirely immaterial what reason was given by the defendant for or what motive actuated him in his refusal to make the lease. He had agreed to make it only provided the parties thereafter agreed upon the plans and alterations to be made, and if no such agreement were arrived at, there was necessarily no lease.

We do not think it is a case where the plaintiff might waive the condition for making the alterations and demand a lease without such agreement having been arrived at. The defendant has agreed that he would give a lease, provided he and the plaintiff should subsequently agree upon plans for alterations to be made. But he was under no obligation to agree upon such plans. On the contrary he might arbitrarily refuse to agree upon them and his refusal would be a sufficient answer to the demand for the execution of the lease. It would be no answer for the plaintiff to show that he had offered to agree on plans which were reasonable and proper, but that the defendant had, without reason, refused to agree upon them. It did not belong to that class of agreements where one party agrees to do work to the satisfaction of another, and in which the court holds the other should, as a matter of law, be satisfied with upon proof that it would be utterly unreasonable not to be so satisfied. Here the condition whether there was to be a lease executed depended wholly upon the fact of the agreement thereafter to be made between the parties as to plans for the alteration of the building. In this instance the parties did agree, the one to lease and the other to receive the lease upon certain conditions to be thereafter mutually agreed upon. Those conditions never were thereafter mutually agreed upon, and hence no right to claim the lease ever existed. The motives of the defendant for his refusal are wholly immaterial.

5. Indications of Intention.

Farina v. Fickus. L. R. (1900) 1 Ch. (Eng.) 331.

Farina married Miss Fickus after correspondence with her father, in which the father gave his consent to the marriage, and

stated that his daughter should have a share of what he left, after the death of her mother. The Farinas contend that the marriage following this statement was an acceptance of an offer, and that the marriage was made pursuant thereto.

Held, that a statement of intention is not an offer.

Cozens-Hardy, J.

A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to obtain any relief. The material words in the letter are these: "You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, whom I wish to leave in comfortable independence if I should leave her a widow." The plaintiff's contention is that the true meaning and effect of the letter is this: "If you, Mr. Farina, will make a settlement on my daughter before her marriage, I will give my assent, and—subject only to the rights of my widow, as to which I reserve myself a free hand—I will bind myself to leave her by my will an equal share with all my other surviving children in my property, subject only to debts and testamentary expenses." Upon consideration, I cannot bring myself to believe that this is the true effect of the letter. I regard it as in no sense a proposal or offer, but rather as a representation that the testator was not in a position to make any proposal or to give his daughter anything at the time, but that he intended to give her something at his death. I do not regard it as an offer resulting in a contract by the testator.

6. Vague Agreements.

Varney v. Ditmars. 217 N. Y. 223.

Varney and Ditmars made an agreement whereby Ditmars should pay Varney, an architect employed by him, a fair share of the profits of his business. Varney was subsequently discharged, and sues for a share of the profits.

Held, that an agreement to give a fair share of profits is too vague and indefinite to be the basis of a contract.

Chase, J.

The statement alleged to have been made by the defendant about giving the plaintiff and said designer a fair share of his profits is vague, indefinite and uncertain, and the amount cannot be computed from anything that was said by the parties or by reference to any document, paper or other transaction. The minds of the parties never met upon any particular share of the defendant's profits to be given the employees or upon any plan by which such share could be com-

puted or determined. The contract so far as it related to the special promise or inducement was never consummated. It was left subject to the will of the defendant or for further negotiations. It is urged that the defendant by the use of the word "fair" in referring to a share of his profits, was as certain and definite as people are in the purchase and sale of a chattel when the price is not expressly agreed upon, and that if the agreement in question is declared to be too indefinite and uncertain to be enforced a similar conclusion must be reached in every case where a chattel is sold without expressly fixing the price therefor.

The question whether the words "fair" and "reasonable" have a definite and enforceable meaning when used in business transactions is dependent upon the intention of the parties in the use of such words and upon the subject matter to which they refer. In cases of merchandising and in the purchase and sale of chattels the parties may use the words "fair and reasonable value" as synonymous with "market value." A promise to pay the fair market value of goods may be inferred from what is expressly agreed by the parties. The fair, reasonable or market value of goods can be shown by direct testimony of those competent to give such testimony.

Such contracts are common, and when there is nothing therein to limit or prevent an implication as to the price, they are, so far as the terms of the contract are concerned, binding obligations.

The contract in question, so far as it relates to a share of the defendant's profits, is not only uncertain but it is necessarily affected by so many other facts that are in themselves indefinite and uncertain that the intention of the parties is pure conjecture. A fair share of the defendant's profits may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered. Such an executory contract must rest for performance upon the honor and good faith of the parties making it. The courts cannot aid parties in such a case when they are unable or unwilling to agree upon the terms of their own proposed contract.

It is elementary in the law that, for the validity of a contract, the promise, or the agreement, of the parties to it must be certain and explicit and that their full intentions may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite.

7. Notice of Revocation.

Brauer v. Shaw. 168 Mass. 198.

The defendants telegraphed at 11:30 A. M. from Boston, offering to let to the plaintiffs the space on the Warren line of steamships during the month of May, for the carriage of cattle from Boston to Liverpool at so much per head. The telegram was received by the plaintiffs in New York at 12:16 and at 12:28 a reply was sent accepting the offer. This reply was not received

until 1:20. At 1:00 the defendants telegraphed revoking their offer, the message being received in New York at 1:43. The plaintiffs seek to hold the defendants to the contract.

Held, that revocation of an offer does not become effective until it is received.

Holmes, J.

There is no doubt that the reply was handed to the telegraph company promptly, and at least it would have been open to a jury to find that the plaintiffs had done all that was necessary on their part to complete the contract. If then the offer was outstanding when it was accepted, the contract was made. But the offer was outstanding. At the time when the acceptance was received, even, the revocation of the offer had not been received. It seems to us a reasonable requirement that, to disable the plaintiffs from accepting their offer, the defendants should bring home to them actual notice that it had been revoked. By their choice and act they brought about a relation between themselves and the plaintiffs which the plaintiffs could turn into a contract by an act on their part and authorized the plaintiffs to understand and to assume that that relation existed. When the plaintiffs acted in good faith on the assumption, the defendants could not complain. Knowingly to lead a person reasonably to suppose that you offer and to offer are the same thing. The offer must be made before the acceptance, and it does not matter whether it is made a longer or shorter time before, if by its express or implied terms it is outstanding at the time of the acceptance. Whether much or little time has intervened, it reaches forward to the moment of acceptance and speaks then. It would be monstrous to allow an inconsistent act of the offerer, not known or brought to the notice of the offeree, to affect the making of the contract.

8. Revocation by Death of Offerer.

Jordan v. Dobbins' Adm. 122 Mass. 168.

Dobbins agreed with Jordan, Marsh & Company, to guarantee the payment of all goods which the said company should sell Moore until Dobbins should notify them to the contrary. Notice of acceptance of the guaranty was waived. Dobbins died. Later Jordan, Marsh & Company sold goods to Moore, not knowing of the death of Dobbins. They sue to recover on the guaranty.

Held, that until a guaranty, in reality a continuing offer, is acted upon, it imposes no obligation and creates no liability on the guarantor.

Morton, J.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for

anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon.

Such being the nature of a guaranty, we are of the opinion that the death of the guarantor operates as revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

9. Sealed Offers. (Majority Rule.)

O'Brien v. Boland. 166 Mass. 481.

Boland made an offer under seal to O'Brien, to sell property owned by Boland at any time within ten days for a specified price. Three days later he notified O'Brien that he withdrew the offer. Four days thereafter O'Brien accepted the offer, and sues to enforce the contract.

Held, that the offer under seal could not be revoked prior to the time of its expiration.

Barker, J.

In the present case, because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which the plaintiff can enforce. The plaintiff might have assented to the withdrawal, and the offer would have been at an end. But he was not bound to assent, and could treat the withdrawal as inoperative.

10. Revocation of Offer to Public in Manner of Offer.

Shuey v. United States. 92 U. S. 73.

On April 20, 1865, the Secretary of War published in the newspapers, and otherwise, a proclamation announcing a reward of \$25,000 for the apprehension of John H. Surratt, one of Booth's accomplices, and a reward for any information that should conduce to the arrest of either Surratt or Booth, or their accomplices. On November 24, 1865, the President caused to be published his order revoking the reward offered for the arrest of

Surratt. Ste. Marie, in ignorance of the withdrawal of the offer, gave information which led to the arrest of Surratt, who was in the military service of the Papal government as a Zouave. His executor seeks to recover the reward.

Held, that the revocation was effective, although the service was rendered without knowledge thereof.

Strong, J.

It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

II. Revocation by Lapse of Time.

Loring v. City of Boston. 7 Metc. (Mass.) 409.

Loring sues the city of Boston to recover a reward offered by the city for the apprehension and conviction of any person setting fire to any building within the city limits. The offer was never withdrawn. Three years and eight months after the appearance of the offer, an incendiary set fire to a building. He was apprehended and convicted through the efforts of Loring.

Held, that the offer had been revoked by lapse of time.

Shaw, C. J.

By fair implication, there must be some limit to this offer, and there being no limit in terms, then by a general rule of law it must be limited to a reasonable time after the offer was made.

Every consideration arising from the nature of the case confirms the belief that such offer of reward, for a special service of this nature, is not unlimited and perpetual in its duration, but must be limited to some reasonable time. The difficulty is in fixing it. One circumstance, perhaps a slight one, is, that the act is done by a board of officers who themselves are annual officers. But as they act for the city, which is a permanent body, and exercise its authority for the time being, and as such a reward might be offered near the end of

the year, we cannot necessarily limit it to the time for which the same board of mayor and aldermen have to serve; though it tends to mark the distinction between a temporary act of one branch and a permanent act of the whole city government.

We have already alluded to the fact of the discontinuance of the advertisement as one of some weight. It is some notice to the public that the exigency has passed, for which such offer of a reward was particularly intended. And though such discontinuance is not a revocation of the offer, it proves that those who made it no longer hold it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards.

But it is not necessary, perhaps not proper, to undertake to fix a precise time as reasonable time; it must depend on many circumstances.

Under the circumstances of the present case, the court are of opinion that three years and eight months is not a reasonable time within which, or rather to the extent of which, the offer in question can be considered as a continuing offer on the part of the city.

B. Acceptance.

1. Communication of Acceptance.

White v. Corlies. 46 N. Y. 467.

Corlies & Company, after negotiating with White concerning the fitting up of offices, wrote White that upon an agreement to finish the fitting up of these offices within two weeks he could begin work at once. White purchased the lumber and began work thereon. The next day the order was countermanded. White claims he had accepted the offer.

Held, that an acceptance must ordinarily be communicated.

Folger, J.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time, communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail containing an acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act, uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased the stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought, formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

2. Acceptance by Act.

Carlill v. The Carbolic Smoke Ball Co. (1893) 1 Q.B. (Eng.) 256.

The defendants, who were proprietors and vendors of a medical preparation called the Carbolic Smoke Ball, inserted in the Pall Mall Gazette the following advertisement: "One hundred pounds reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. One thousand pounds is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." The plaintiff, on the faith of this advertisement, bought some of the balls at a druggist's and used them as directed, from November 20 to January 17, when she was attacked by the influenza. She sues for the reward.

Held, that an offer contained in an advertisement may be accepted by the act called for, without notice of acceptance.

Lindley, L. J.

In the first place, it is said that it is not made with anybody in particular. Now, that point is common to the words of the advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the conditions accepts the offer. In point of law this advertisement is an offer to

pay one hundred pounds to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer.

Bowen, L. J.

One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is no consensus, which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so; and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating an acceptance of it back again to himself, performance of the condition is a sufficient acceptance without notification.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition, notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all persons to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look for the dog, and as soon as they find the dog, they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be a notification of acceptance. It follows from the nature of the thing that the performance of the conditions is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

3. When Acceptance Takes Place.

Tayloe v. The Merchants' Fire Insurance Co. 9 How. (U. S.) 390.

Tayloe applied for insurance with the defendant company, which stated terms and asked for a check to conclude the matter in case he accepted. On the 20th of December he mailed a letter expressing his assent to the terms and enclosing a check. On the 22nd, one of the insured buildings was burned. On the 31st the letter of acceptance was received.

Held, that this was a binding contract, as acceptance dates from the time of mailing it.

Nelson, J.

An offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed a valid undertaking on the part of the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a dis-

tance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known to each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain from the time of the transmission of the acceptance.

4. Acceptance to Place Specified.

Eliason v. Henshaw. 4 Wheat. (U. S.) 225.

Eliason and others offered to buy from Henshaw two or three hundred barrels of flour to be delivered at Georgetown by water for \$9.50 per barrel. They requested in a postscript that Henshaw should write by return of wagon whether the offer was accepted and sent the offer by a wagon hauling flour in Henshaw's service from his mill to Harper's Ferry, near which the defendants then were. Henshaw replied by mail to Georgetown accepting the offer and now sues on the contract.

Held, that there was no contract, as the acceptance was not in the manner and at the place specified in the offer.

Washington, J.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received

the assent of both parties, the negotiation is open and imposes no obligation upon either.

It appears that no answer to this letter was at any time sent to Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed "Georgetown," and received at that place; but an acceptance communicated at a place different from that pointed out by the offerers, and forming a part of their proposal, imposed no obligation binding upon them unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the [offerers] had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties.

5. Acceptance in Manner Implied.

Lucas v. The Western Union Tel. Co. 131 Ia. 669.

Lucas had been negotiating for an exchange of property with Sas, and had received an offer by mail from Sas which he accepted by telegraph, instead of by mail. The telegram was delayed by the company, and was not received until Sas had revoked his offer. This suit is brought against the defendant for delay in transmission of the telegram on the contention of the plaintiff that he had thereby lost the contract with Sas.

Held, that acceptance must be by the agency implied; otherwise it will not take effect until it is received.

Ladd, J.

The proposition of an exchange was made to the plaintiff by letter. In committing it, properly addressed to the mails for transmission, the post office became the agent of Sas to carry the offer, he taking the chances of delays in transmission. Having sent the proposition by mail he impliedly authorized its acceptance through the same agency. Such implication arises (1) when the post is used to make the offer and no other mode is suggested, (2) when the circumstances are such that it must have been within the contemplation of the parties that the post would be used in making the answer. The contract is complete in such a case when the letter containing the acceptance is properly addressed and deposited in the United States mails. This is on the ground that the offerer, by depositing this letter in the post office, selects a common agency through which to conduct the negotiations and the delivery of the letter to it is in effect a delivery to the offerer. Thereafter the acceptor has no right to the letter and

cannot withdraw it from the mails. Even if he should succeed in doing so, the withdrawal will not invalidate the contract previously entered into.

But the plaintiff did not adopt this course. On the contrary, he chose to indicate his acceptance by transmitting a telegram to Sas by the defendant company. Sas had done nothing to indicate his willingness to adopt such agency, and the defendant in undertaking to transmit the message was acting solely as the agent of the plaintiff. The latter might have withdrawn the message or stopped its delivery at any time before it actually reached Sas. It is manifest that handing the message to his own agent was not notice to the sendee of the telegram. The most formal declaration of an intention of acceptance of an offer to a third person will not constitute a contract. A written letter or telegram, like an oral acceptance, must be communicated to the party who has made the offer or to some one expressly or impliedly authorized to receive it, and this rule is not complied with by delivering it to the writer's own agent or messenger even with direction to deliver to the offerer.

The party making the offer may be entirely satisfied to trust the mails, and not be willing to chance the use of the telegraph.

It is very evident on authority and principle that, in the absence of any suggestion, one transmitting an offer by mail cannot be bound by an acceptance returned in some other way until it is received or he has notice thereof.

The plaintiff, then, did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 P. M. of the day after the letter had been received.

6. Necessity of Unconditional Acceptance.

Poel v. Brunswick-Balke-Collender Co. 216 N. Y. 310.

Poel & Arnold attempt to hold the Brunswick Company for breach of a contract alleged to have been made by two written communications. Poel & Arnold sent a form of contract for the sale of 12 tons of rubber at \$2.42 per lb. to the Brunswick Company, whose agent in behalf of the defendant replied with an order for the amount, but added new terms, viz., a condition that the goods should be delivered when specified and that acceptance of the order be acknowledged.

Held, that no contract was made by the conditional acceptance.

Seabury, J.

The defendant's letter of April 6th was not an acceptance of this offer made by the plaintiffs in their letter of April 4th. It was a counter-offer or proposition for a contract. Its provisions make it perfectly clear that the defendant (1) asked the plaintiff to deliver

rubber of a certain quality and quantity at the price specified in designated shipments; (2) it specified that the order therein given was conditional upon the receipt of its order being promptly acknowledged; (3) upon a further condition that the plaintiff would guarantee delivery within the time specified. It may be urged that the conditions specified in the defendant's order, that the plaintiffs would guarantee the delivery of the goods within the time specified, added nothing of substance to the agreement, because if the offer was accepted the acceptance itself would involve this obligation on the part of the plaintiffs. The other condition specified by the defendant cannot be disposed of in the same manner. That provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition that the defendant had the right to annex to its offer. The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth. When this assent was given and the acknowledgment made, this contract was then to come into existence, and would be completely expressed in writing. The plaintiffs did not acknowledge the receipt of this order and the proposal remained unaccepted. As the party making this offer deemed this provision material and as the offer was made subject to compliance with it by the plaintiffs, it is not for the court to say that it is immaterial. When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract or it could reject the offer. There was no middle course. If it did not accept the offer proposed, it necessarily rejected it. A proposal to accept the offer if modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs.

7. Termination of Offer by Counter-offer.

Minneapolis & St. Louis Railway v. Columbus Rolling Mill.
119 U. S. 149.

The railroad company sues the mill, alleging an agreement for the purchase and sale of 2,000 tons of rails. On December 5, the railroad asked for a quotation on prices for 2,000 to 5,000 tons of iron rails. On December 8, the mill offered to sell 2,000 to 5,000 tons at \$54.00 per gross ton, and stated that in case of acceptance it expected to be notified before December 20. On December 16, the railroad ordered 1,200 tons. On December 18, the mill declined to take the order. On December 19, the railroad ordered 2,000 tons, which the mill refused to deliver.

Held, that no contract was formed, as the counter-offer terminated the original offer.

Gray, J.

As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open and imposes no obligation upon either party; the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the party by whom, it was made.

The defendant, by the letter of December 8, offered to sell to the plaintiff two thousand to five thousand tons of iron rails on certain terms specified, and added that if the offer was accepted the defendant would expect to be notified prior to December 20. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than two thousand nor more than five thousand, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20. Instead of accepting the offer made, the plaintiff, on December 16, by telegram and letter referring to the defendant's letter of December 8, directed the defendant to enter an order for twelve hundred tons on the same terms. The mention in both telegram and letter of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer varying the number of tons, and therefore in law a rejection of the offer. On December 18, the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19, was therefore ineffectual and created no rights against the defendant.

II.

FORM OF CONTRACTS.

Certain contracts, though possessing the other elements necessary to make a valid contract, must be in a particular form in order to be enforceable. These contracts may be divided into contracts

which must be sealed and contracts which must be in writing. All other contracts are equally good whether sealed, written, or oral. Grants or conveyances of land; bonds (obligations conditioned upon the payment of money or the doing of, or forbearance from, some act); covenants (warranties of the performance or non-performance of certain acts, or of the existence or non-existence of certain facts); and releases, must be sealed. At the present time, the seal need be nothing more than an attached wafer of any sort and some states have gone so far as to hold that the seal may be made by a mark upon the paper itself. Indeed, some states have by statute abolished the distinction between sealed and unsealed instruments.

The following are characteristics of agreements under seal:

1. They must be delivered in order to create a contractual obligation. This delivery may be to the other contracting party himself, or it may be to a third person to hold pending the fulfilment of conditions, in which case the delivery is said to be in escrow.
2. The Statute of Limitations, which limits the time within which actions may be brought, allows a longer period for this purpose in the case of sealed than in the case of unsealed instruments.
3. Recitals in a sealed instrument are conclusive against the parties thereto, who are said to be estopped to deny them.
4. A contract under seal merges a prior simple contract (i.e., any contract not under seal, whether written or oral), which no longer exists independently.
5. In most cases, no consideration for an agreement under seal is necessary; although when there has been a consideration it may be shown to be illegal or immoral. Courts of equity, however, will not grant specific performance (i.e., literal performance of the terms of the contract as distinguished from damages for its breach) when the contract is without, or is upon inadequate, consideration.

Certain contracts to be enforceable must be in writing under the terms of the Statute of Frauds, originally enacted in England in 1677, and intended to restrain the prevalent tendency toward fraud and perjury. This statute, parts of which have been enacted in similar form by all jurisdictions basing their legal systems on the law of England, specifies certain kinds of contracts which shall not be sued upon unless evidenced by a memorandum of their terms signed by the party to be charged. Two sections of this statute, the fourth and the seventeenth, have been universally re-enacted in substance in the modern statutes.

The fourth section provides that unless a contract is evidenced by the required memorandum, no suit shall be brought thereon:

1. To charge an executor or administrator upon a special promise to pay out of his own estate.
2. To charge a person to answer for the debt, default or misdoings of another. It has generally been held under this head that when the payment of the debt of another is incidental only, the case is not within the prohibition of the statute. The case is also not within the statute:
 - (a) if the promise is a promise to the debtor, not the creditor, to pay his debt;
 - (b) if exclusive credit is given to the promisor;
 - (c) if the liability is shifted from the debtor to the promisor; and
 - (d) if the main object of the promise is to serve some special business purpose of the promisor.
3. To charge a person upon an agreement made upon consideration of marriage.
4. To charge a person upon a contract for the sale of lands or any interest in or concerning them.
5. To charge a person upon an agreement that is not to be performed within a year from the time it is made, a provision which is restricted to contracts impossible of performance within that time.

In order to satisfy the provisions of this section, a note or memorandum is essential, although no particular form is required. It must express the substance of the contract with reasonable certainty, must show who are the parties to the contract, and must be signed by the party against whom suit is brought, or by his duly authorized agent. A few jurisdictions hold that it must be signed by both parties. Failure to comply with the fourth section excludes oral proof of the contract and makes it unenforceable unless the other party has paid money, performed services, or conveyed property under it to such an extent that he cannot be placed in *statu quo*. In that event, he is entitled to recover for the benefit conferred. In addition to the foregoing, certain states provide that a promise to pay a debt discharged by bankruptcy or insolvency, an infant's ratification of his contract when he becomes of age, a contract to make a will, or a representation concerning the credit of another party, must be in writing in order to support an action.

The seventeenth section of the statute of frauds relates to the sale of goods, wares and merchandise, if the sale involves more than a specified price, ranging from fifty dollars to two thousand five hundred dollars in the several states. This section may be satisfied not only by the memorandum, but by part payment or receipt and acceptance of part of the goods, a subject to be discussed under the law of Sales.

A. Sealed Instruments.

1. Nature of a Seal.

Lorah v. Nissley. 156 Pa. St. 329.

Nissley made a note payable to the order of Lorah, which note he sealed by writing his name to the left of a printed word "seal." The question arises whether this was a sealed instrument within the meaning of the statute of limitations, which provides that actions may be brought on sealed contracts within twenty years from the due date, while actions on unsealed contracts must be brought within six years.

Held, that the printed word "seal" is at the present time a sufficient seal.

Mitchell, J.

The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, and the same stamp may serve several parties in the same deed. Not only so, but the use of wax has almost entirely, and even of wafers very largely, ceased. In short, sealing has become constructive rather than actual, and is in a great degree a matter of intention.

Decisions establish beyond question that any flourish or mark however irregular or inconsiderable, will be a good seal, if so intended, and a fortiori the same result must be produced by writing the word "seal," or the letters "L. S.," meaning originally *locus sigilli*, but now having acquired the popular force of an arbitrary sign for a seal, just as the sign "&" is held and used to mean "and" by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin "et."

If therefore the word "seal" on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be canceled before signing. The pressure of business life and the subdivision of labor in our day, have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments.

2. Delivery.

Tisher v. Beckwith. 30 Wis. 55.

Tisher made a deed of certain real estate to his son, Charles, which was neither dated nor delivered. The deed was kept by Tisher in a trunk in which the son kept some of his papers, and from which the son stole it, and mortgaged the premises to the defendants. Tisher seeks to restrain them from foreclosing on the mortgage given by the son.

Held, that a deed must be delivered in order to be valid.

Dixon, C. J.

It is essential to the validity of a deed that it should be delivered, and such delivery to be valid must be voluntary, that is, made with the assent and in pursuance of an intention on the part of the grantor to deliver it, and if not so delivered it conveys no title. A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent or acquiescence, is no more effectual to pass title to the supposed grantee than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor in such cases, is whether he was guilty of any negligence in having made, signed and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it and so be enabled to deceive and defraud innocent third persons. It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this respect was so great, and his inattention and carelessness to the rights of others so marked, that the law would on that account estop him from setting up his title as against a bona fide purchaser for value under such deed. There are some facts and circumstances in this case strongly suggestive of such a defense, and were it not for the fact found by the court that the deed was never fully executed, and the further fact fully established in evidence that it was unstamped when put away by the plaintiff in the trunk in the manner described by himself and the other witnesses, we might possibly have some hesitation about affirming the judgment of the court below on this ground.

3. Estoppel.

Atlantic Dock Co. v. Leavitt. 54 N. Y. 35.

The Atlantic Dock Company sold a piece of property to the defendants' predecessor in title. The deed recited that the said predecessor in title and his assigns should not use the property

for a distillery. The defendants built a distillery on the property and the plaintiff sues to restrain them from violating the covenant.

Held, that a person who is a party to a deed is estopped to deny the recitals therein contained.

Earl, C.

In the case of a deed containing covenants to be performed by the grantee, the grantee who has induced the grantor to give the deed in reliance upon the covenants, and who has accepted the deed and enjoyed the estate granted, is estopped from denying his covenants. He is estopped from denying that the seal attached to the deed is his as well as that of the grantor, and hence when sued upon his covenants, the proof of the deed and of his acceptance thereof and enjoyment of the estate conclusively establishes that he has covenanted as stated in the deed. "A recital of a fact in a deed, is as against the grantee in such deed, and all persons claiming under him through that deed, evidence of the fact recited therein, so as to save the necessity of further proof thereof by the grantor or those who claim under him." The acceptance of the deed operates as an estoppel upon the grantee and his assigns or representatives. "A man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him or by acting under it, shall not be received to deny its existence." And such estoppels run with the land into whose hands so-ever it comes.

4. Merger of Prior Simple Contract.

Griswold v. Eastman. 51 Minn. 189.

Eastman and Merriam owned an island in the Mississippi, part of which they laid out in lots according to a plat, showing Park Street running along the edge of the bluff. Purchasers of lots claim that Eastman and Merriam represented that the land between Park Street and the river was dedicated to public use, although neither the plat nor their deeds so provided. They sue to enjoin Eastman from asserting title to the land.

Held, that any prior contracts are merged in the subsequently executed deeds.

Mitchell, J.

After the plat was executed and filed, conveyances according and with reference to it were accepted in performance of these executory contracts; and there is not a particle of evidence that at the time of acceptance of these conveyances the purchasers were not fully aware of the nature and contents of the recorded plat.

Where deeds are executed and accepted in performance of executory contracts to convey, the latter become *functus officio*, and

thenceforth the rights of the parties are to be determined by the deeds, and not by the contracts, the presumption being that the deeds give expression to the final purposes of the parties; and the deeds will be conclusive unless it be shown that the grantees have been led by fraud or mistake of fact to accept something different from what the executory contracts called for, in which cases, the courts will give relief as in other cases of fraud or mistake.

5. Nature of Consideration Usually Immaterial at Law.

Hartshorn v. Day. 19 How. (U. S.) 211.

Day sues Hartshorn and Hayward in an action to determine the title to a patent for the preparation of rubber. Both parties claim under Chaffee, the original patentee, who had attempted to rescind a sealed agreement under which Hartshorn and Hayward hold, asserting that the agreement had been procured by fraud. Following this attempted rescission Chaffee assigned the patent to Day.

Held, that in the case of a sealed instrument a law court will not go behind the seal to determine fraud.

Nelson, J.

The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed; and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed.

Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.

It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the form in which it is presented, and also upon the parties to the

litigation. A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law.

The case in hand illustrates the impropriety and injustice of admitting evidence of fraud to defeat agreements of the character in question in a court of law. Goodyear and his licensees had acquired vested and valuable rights under the agreements in this patent, and were in no way privy to, or connected with, the alleged fraud, nor parties to this suit; and yet it is assumed, and without the assumption the fraud would be immaterial, that the effect of avoiding the agreements would be to abrogate these rights. They had been in the enjoyment of them for nearly three years, and may have invested large amounts of capital in the confidence of their validity. They were derived from Chaffee himself, the patentee of the improvement. A court of equity, on an application by him to set aside the agreements on the ground of fraud, would have required that these third parties in interest should have been made parties to the suit, and would have protected their rights or secured them against loss, if it interfered at all, upon the commonest principles of equity jurisprudence.

6. Illegality or Immorality of Consideration of Sealed Contract.

Collins v. Blantern. 2 Wil. (Eng.) 341.

Collins, the plaintiff, gave a note to Rudge as a reward for failing to appear in a criminal suit. The defendant, Blantern, executed a bond to Collins to guarantee payment of the note, which was the only consideration for the bond, on which Collins now sues.

Held, that the consideration for a sealed instrument may be shown to be illegal or immoral.

Wilmot, L. C. J.

It is now objected, as a maxim, that the law will not endure a fact outside of what appears in a specialty to be averred against it, and that a deed cannot be defeated by anything less than a deed, and a record by a record, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shows that, in truth, the bond never had any legal entity, and if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength does not apply to this case. The law will legitimate the showing it void *ab initio*, and this can only be done by pleading; nothing is due under such a contract; then the law gives

no action, the *debitum* never existed; as much as if it had been said it shall be void because there is no debt; but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to me most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, you shall not be permitted to plead the facts which clearly show it to be wicked and void! I am not for stirring a single pebble of the common law, and without altering the least tittle thereof, I think it is competent, and reaches the case before us.

7. Nature of Consideration Material in Equity.

Crandall v. Willig. 166 Ill. 233.

Mr. and Mrs. Willig gave Wickersham an option to buy a piece of property at any time within a year and a half. The option was sealed, but no other consideration was given. Crandall, an assignee of the original holder of this option, seeks to enforce specific performance of the contract to convey the real estate, he having demanded a conveyance within the time specified but after the Willigs had repudiated the agreement.

Held, that specific performance will not be granted in the case of a contract for which there is no consideration, even though it be under seal.

Carter, J.

It rests in the sound legal discretion of the court whether it will or not compel the specific performance of a contract. True, that discretion must be exercised according to the settled principles of equity, and not arbitrarily. But to entitle the complainant to a decree the contract must be founded on a sufficient consideration, and must be reasonable, fair and just. Relief will not be granted unless it will subserve the ends of justice. And in the case of unilateral contracts the courts will exercise their discretion with great care, and will view any delay of the purchaser with especial strictness.

The contract in the case at bar was a mere option given by the Willigs to Wickersham to purchase the land in question within the time mentioned, and there was, before its acceptance, no consideration to support the contract. It was therefore within the power of the Willigs to withdraw this option at any time before their offer to sell was accepted. True, the contract was under seal, and purported to be based upon the nominal consideration of one dollar; but the evidence showed that there was in fact no

consideration whatever, and it is well settled that in equity the real consideration may be inquired into, and the parties are not concluded by the recitals in the contract, though under seal. "Equity will never enforce an executory agreement unless there was an actual valuable consideration, and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms and looking at the reality, it requires an actual, valuable consideration as essential in any such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements and executory contracts of every description."

B. Statute of Frauds.

1. Promise by Executor or Administrator.

Dillaby v. Wilcox. 60 Conn. 71.

The defendant, the administratrix of the estate of William Wilcox, promised the plaintiff, the collector of taxes, that if he would forbear levying for taxes upon property of Gordon Wilcox on which the estate of William Wilcox had a mortgage, she would pay the taxes. A suit is brought upon this promise.

Held, that this is not a promise by an executor or administrator to answer out of his own estate for a claim against a deceased person.

Seymour, J.

The first clause has reference to promises by an executor or administrator to answer out of his own estate for a claim against his decedent—some liability resting upon the executor or administrator strictly in his representative character and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate. To change the expression—this clause of the statute covers a special promise made by the executor or administrator to pay, out of his own estate, what, (being the legal representative of the party originally liable) he is already, in that representative capacity, under a liability to pay to the extent of the property which has come into his hands. "The particular object of this provision," says a recent writer upon the statute, "was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies or distributive shares in consequence of a wilful or mistaken perversion of expressions of encouragement which they may have used in conversation with claimants and which were not justified by the ultimate result of administration of the assets in their hands." However that may be, the suggestion illustrates the nature of the promise referred to in

this section. The promise proved, in the case before us, was to answer for the debt or default of Gordon Wilcox, a third party, and is a promise to which that clause has no reference. The suggestion that the defendant, if compelled to pay the judgment, can repay herself out of the assets of the estate does not tend to bring the promise within the clause. Most of the personal obligations of an executor contracted in the course of his administration are proper charges against the estate in the final settlement of his account, but they are none the less his private debts for which he is alone liable in his private capacity. In *Pratt v. Humphrey*, 22 Conn. 317, a leading case upon this clause, the promise was to pay a debt due from the estate of which the defendants were administrators—an entirely different case from the one at bar.

2. Promise to Answer for Debt of Another.

Mallory v. Gillett, 21 N. Y. 412.

Mallory had lien upon a canal boat belonging to Haines. Gillett promised Mallory to pay him the amount due if he would deliver the boat to Haines, which Mallory accordingly did. Mallory sues to recover the amount promised.

Held, that this promise is within the statute of frauds, it being a promise to answer for the debt, default, or misdoings of another.

Comstock, C. J.

There is no pretense that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another, or, in the language of the books, it was a collateral promise. The consideration was perfect, but as there was no writing, the case seems to fall within the very terms of the statute. Authorities need not be cited to prove that the sufficiency of the consideration never takes a case out of the statute. Indeed, there can be no question under the statute of frauds in any case, until it is ascertained that there is a consideration to sustain the promise. Without that element, the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing. The mere existence of a past debt of a third person will not sustain an agreement to pay it, unless there be forbearance to sue, or some other new consideration. In such a case, when we find there is a new consideration, we then, and not till then, reach the inquiry whether the agreement must be in writing. Such is this case. It is nothing to say that here was a new consideration. If such were not the fact, there would be no question in the case.

There is sometimes danger of error creeping into the law

through a mere misunderstanding or misuse of terms. The words "original" and "collateral" are not in the statute of frauds, but they were used at an early day—the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt.

What is a promise to answer for the "debt or default" of another person? Under this language, perplexing questions may arise, and many have arisen, in the courts. But some propositions are extremely plain; and one of them is, that the statute points to no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. The requirement is, that promises to answer for the debt, etc., of a third person, be in writing. The original and collateral obligations may come into existence at the same time, and both be the foundation of the credit, or the one may exist and the other be created afterwards. In either case, and equally in both, the inquiry under the statute is whether there be a debtor and a surety, and not when the relation was created. If A say to B, "If you will suffer C to incur a debt for goods which you will now or hereafter sell and deliver to him, I will see you paid," the promise is within the statute. This no one ever doubted. But if A say to B, "If you will forbear to sue C for six months on a debt heretofore incurred by him for goods sold and delivered to him, I will see you paid,"—is not the case equally plain? So if, in such a case, instead of forbearance, there is some other sufficient consideration, for example, forgiving a part of the debt or relinquishing some security for it, the difference is still one of circumstance, but not of principle. In the case first put, the consideration of the guaranty is the original sale of the goods on the faith of it: in the other, it may be forbearance or the relinquishment of some advantage, the original debt still remaining.

It is said that the promise now in question need not be in writing, because it was new and original, and was founded on the relinquishment to the debtor of a security which the creditor held. To say that it was new and original, expresses no idea of any importance. Every promise is new and original that was never made before. An undertaking to answer for an old debt of a third person certainly has no more of originality than one to answer for a debt now contracted. As to the relinquishment of the lien or security, this, although a meritorious consideration, is, in judgment of law, no more so than any other which is sufficient to sustain a contract. Forbearance to sue has the same legal merit, and so has the release of a part of the debt.

3. Promise to Debtor to Answer for his Debt.

Aldrich v. Ames. 9 Gray (Mass.) 76.

Aldrich, the plaintiff, at the request of Ames, the defendant, and for a valuable consideration, furnished bail for Crehore, upon

which Ames promised Aldrich to save him harmless. The defense is that this was a promise to pay the debt of another and that therefore the action cannot be maintained without an agreement in writing.

Held, that a promise to the debtor, not the creditor, is not, as between the debtor and the promisor, within the statute.

Shaw, C. J.

This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds.

The theory of the statute of frauds is this; that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A., a debtor, owes a debt to B., and C. promises B., the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C., on good consideration, promise A., the debtor, to pay the debt to B. and indemnify A. from the payment, although one of the results is to pay the debt to B., yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

4. Contract Made on Credit of Promisor.

Swift v. Pierce. 13 Allen (Mass.) 136.

Swift sues to recover from Pierce and another, for meat which he had delivered to Hoar, at the request of the defendants. The evidence was conflicting whether or not credit had been given exclusively to the defendants. The statute of frauds was pleaded and the case came up on the question of the correctness of instructions to the jury.

Held, that an oral promise to pay for goods delivered to another is collateral unless credit is given exclusively to the promisor.

Hoar, J.

If the contract of the defendants was a collateral and not an original promise, then, being a promise to pay the debt of another, and not in writing, the statute of frauds was a good defense. And the jury were rightly instructed that, if they found that the defendants were guarantors only, they should find a verdict for them. The judge added "that the defendants would be guarantors only, if at the time said articles were delivered to Hoar the plaintiff gave credit to Hoar alone." The instruction should have been that the defendants

would be only guarantors, unless, when the meats were delivered, the plaintiff gave credit to them alone. It seems to be well settled by the authorities that where goods are delivered to one person, and another, not a joint contractor with him, promises to pay for them, if any credit is given to the former, the promise of the latter is collateral, and within the statute of frauds. Chancellor Kent states the rule thus: "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing."

The statement of the learned judge was certainly true, that if the credit was given to Hoar only, the defendants were only guarantors. But he did not inform the jury that the defendants might be guarantors also in case any credit was given to Hoar, although the plaintiff gave credit in part to their guaranty beside.

5. Extinction of Original Debt.

The Meriden Britannia Co. v. Zingsen. 48 N. Y. 247.

Mattison owed money to the plaintiff which he could not pay, and which the defendant Zingsen agreed to pay for him, the plaintiff agreeing to release Mattison. Suit is brought upon this promise and the defendant sets up the statute of frauds.

Held, that when the original debt is extinguished in consideration of the promise of a third person, the contract is not within the statute of frauds.

Earl, C.

It is not every verbal promise to pay the debt of another that is void within this statute. There are many exceptions, as disclosed by the numerous cases upon the subject.

A promise to pay the debt of a third person is not within the statute, where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is then what is known in the civil law as a delegation, and the creditor takes a new debtor, who is called the delegated debtor.

Chief Justice Mansfield said that he did not see "how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain." "A promise to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct at the time when that of the promisor came into existence, or if the third person's antecedent liability to the promisee is discharged

in consideration of its assumption by the promisor." And, in this case, it was distinctly agreed between the three parties—the creditor, debtor and promisor—that in consideration that the father of the debtor would pay the promisor \$1,000 in money, and the debtor give him his own notes for the balance, the promisor would pay the claim of the creditor in plated ware, in the months of February and March thereafter, and the creditor should release the debtor.

6. Promise for Benefit Received by Promisor from Creditor.

Davis v. Patrick. 141 U. S. 479.

Patrick, manager of a mine in which Davis was interested as a creditor, was induced to continue work at the mine by Davis' promise to see that Patrick was paid for his services.

Held, that when the leading object of the transaction is to secure a benefit to the promisor, the case is not within the statute of frauds.

Brewer, J.

The purpose of this provision of the statute of frauds was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words, of encouragement and confidence into an absolute promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this court in *Emerson v. Slater*, 22 Howard 28, 43: "Whenever the main purpose

and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To this may be added: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category.

7. Promise for Benefit Received by Promisor from Debtor.

Furbish v. Goodnow, 98 Mass. 296.

Furbish held a note executed by Redding. Redding conveyed real estate to the defendant, Goodnow, upon his promise to pay Furbish the amount of the note. This arrangement was oral, but Furbish contends that it was not within the statute, as the defendant received property in return for his promise.

Held, that the contract is within the statute of frauds, as it is a promise to answer for the debt of another, regardless of the benefit to the promisor from the *debtor*.

Gray, J.

If the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another. It must however be constantly borne in mind that the question under the statute is not whether there is a sufficient consideration for the defendant's promise, but whether that promise is to answer for the debt of another. The common law requires a consideration for every promise, oral or written; the statute also requires that, if it is a promise to answer for the debt of another, it shall be in writing. When the original debtor remains liable, yet if the creditor, in consideration of the new promise, releases some interest or advantage relating to or affecting the original debt, and inuring to the benefit of the new promisor, his promise is considered as a promise to answer for his own debt, and the case is not within the statute. But if no consideration moves from the creditor to the new promisor, and the original debtor still remains liable for the

debt, the fact that the promisee gives up something to that debtor, or that a transfer of property is made or other consideration moves from that debtor to the new promisor to induce the latter to make the new promise, does not make this promise the less a promise to answer for the debt of another; but, on the contrary, the fact that the only new consideration either inures to the benefit of that other person, or is paid by him to the new promisor, shows that the object of the new promise is to answer for his debt.

8. Promise upon Consideration of Marriage.

Ogden v. Ogden. 1 Bland (Md.) 284.

Ogden wrote to the father of the fiancé of his niece, Nancy, that he would give her \$6,000 upon her marriage and \$6,000 at his death. He died without having made either gift, and the plaintiffs contend that this was a contract whereby he agreed to pay this amount in consideration of their marrying.

Held, that a contract made upon consideration of marriage is within the statute of frauds.

Bland, C.

The statute of frauds, so far as it is applicable to this case, is expressed in these words:— "No action shall be brought whereby to charge any person, upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This clause was at one time supposed to embrace mutual promises to marry, but that notion has long since been abandoned, and it is now held to extend only to agreements to pay marriage portions, or to such cases as the one now under consideration. The word "agreement," it has been settled, must not be loosely construed, but be taken in its proper and correct sense, as signifying a mutual contract on consideration between two or more parties; the whole of which, the consideration as well as the promise, must be in writing.

The whole of this case rests upon the letter of the 22d of May, 1817. If that cannot be considered as an agreement within the meaning of the statute of frauds, there is an end of the case. The cases in which letters have been considered as constituting such an agreement, have gone fully as far, perhaps farther, than a just construction of the statute will warrant. They all, however, go upon the principle that the court must be satisfied by a fair interpretation of the letters that they import a concluded agreement; or afford sufficient materials for a more formal agreement.

But this letter is deficient in almost every substantial particular.

9. Contracts for Sale of Interest in Land. (Majority Rule.)

Hirth v. Graham. 50 Oh. St. 57.

Hirth sues Graham to recover damages for breach of an oral agreement to sell Hirth certain growing timber. The defense is that the case is within the statute of frauds, as it deals with an interest in land.

Held, that according to the Ohio and general rule, a contract for the sale of growing timber is within the statute of frauds.

Bradbury, J.

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject.

Many decisions have been announced by the English courts, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel.

The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky and Connecticut, sales of growing trees to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds.

The courts of most American states, however, that have considered the question, hold, expressly, that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds.

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of man, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendee with the soil. Coal, petroleum, building-stone, and many other substances constituting integral parts of the land have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate

removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty.

10. Contracts for Sale of Interest in Land. (Massachusetts Rule.)

Drake v. Wells. 11 Allen (Mass.) 141.

Standing wood was orally sold at auction to the defendants. Afterwards, the land on which the timber stood was sold to the plaintiffs, who sue the defendants for cutting and carrying away the wood sold.

Held, that an oral sale of standing timber does not pass title until the timber is cut and that a subsequent sale of the land passed title to such timber to the plaintiffs.

Bigelow, C. J.

The doctrine is now well settled that a sale of timber or other product of the soil, which is to be severed from the freehold by the vendee under a special license to enter on the land for that purpose is, in contemplation of the parties, a sale of chattels only, and cannot be regarded as passing an interest in the land, and is not for that reason required to be in writing as being within the statute of frauds. Such license to enter on the land of another, so far as it is executed, is irrevocable; because, by the severance of the timber or other growth of the soil from the freehold, in execution of the license, it becomes personal property, the title to which is vested in the vendee absolutely, and the rule applies that where chattels belonging to one person are placed or left on the land of another, with the permission or assent of the latter, the owner of the chattels has an implied irrevocable license to enter and remove them. In such case the owner of land cannot, by withdrawing his assent to enter upon his premises, deprive the owner of chattels of his property, or prevent him from regaining possession of them. The law will not lend its aid to the perpetration of a fraud. But it is otherwise where the contract has not been executed by a severance of the subject matter of a contract of sale from the freehold. So long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards separation from the soil, no property or title passes to the vendee. The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still

executory, no title has passed to the vendee, and the refusal of the vendor to permit the vendee to enter on the land for the purpose of disconnecting from the freehold the property agreed to be sold is only a breach of contract, the remedy for which is an action for damages, as in the common case of a failure or refusal to deliver ordinary chattels in pursuance of a contract of sale.

11. Contracts not to be Performed Within a Year.

Warner v. Texas & Pacific Railway Co. 164 U. S. 418.

The railway company agreed with Warner, the plaintiff, that if he would grade the ground for a switch, and put on the ties at a certain point, the railroad would put down the rails and maintain the switch for shipping purposes of the plaintiff as long as he needed it. The company defends an action brought for breach of this contract on the ground that it was within that section of the statute of frauds requiring contracts not to be performed within a year to be in writing.

Held, that a contract which may be performed within a year, even though it probably will not be so performed, is not within the statute.

Gray, J.

It appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in reënacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England.

12. Contracts Which May be Performed Within a Year by Death.

Doyle v. Dixon. 97 Mass. 208.

Dixon sold out his grocery business to Doyle, and orally agreed not to go into that business in Chicopee for five years thereafter. He did enter the grocery business there, two years after making the agreement, and sets up the statute of frauds in defense to an action brought by Doyle for breach of his contract.

Held, that a contract extending over a term of years is not within the statute of frauds if the contract may be performed upon the death of the promisor within a year.

Gray, J.

It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in *Peters v. Westborough*, 19 Pick. 364, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray 131, that an agreement to employ a boy for five years and to pay his father sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year.

An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing

a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

13. Nature of Memorandum Required.

Grafton v. Cummings. 99 U. S. 100.

Cummings sues Grafton on an agreement, the only memorandum of which was a paper signed by Grafton stating that he acknowledged himself the purchaser of the Glen House in the White Mountains, for an amount specified. The name of the vendor was omitted from the memorandum.

Held, that the memorandum required by the statute of frauds must specify with reasonable certainty the parties to the transaction.

Miller, J.

The statute not only requires that the agreement on which action is brought or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and deliver the consideration for the price so paid.

There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true, that if a vendor was named in this paper, the offer to perform on his part would bind the party who did sign. But Grafton did not agree to buy this property of anybody who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to that vendor. The name of that vendor, or some

designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.

14. Nature of Memorandum Required.

Desmarais v. Taft. 210 Mass. 560.

Taft agreed to sell Desmarais a parcel of land, and the following memorandum of the transaction was drawn up:

"\$100.00 Northbridge, Mass., Aug. 7, 1900.

"Received one hundred dollars from E. Desmarais in part payment for a piece of land next to Pelequin, seventy feet on the road and back to an old wall.

"Elenor Taft."

Held, that the memorandum was sufficient to satisfy the statute of frauds.

Rugg, C. J.

The statute of frauds requires a memorandum "to contain a description of the land sufficient for purposes of identification, when read in the light of all the circumstances of ownership of the property by the vendor. Attendant circumstances may be shown outside the writing and by parol for the purpose of interpreting and applying the memorandum." On the other hand, a description which, when applied to the physical features upon the surface of the earth and read in the light of the facts surrounding the parties at the time of its execution, fails to identify particular land as alone conforming to its terms, does not satisfy the statute of frauds. Objects and circumstances can be resorted to for applying and translating the words of the memorandum into terms of land. The language of the memorandum is not unlike that which country folk would use when they meant a strip with parallel sides. Although verging toward vagueness, the description in the memorandum applied to the facts on the surface of the earth identifies a specific tract of land.

The exact consideration for the conveyance under our authorities need not be stated in the memorandum.

15. Signature of Memorandum by Party to be Charged.

Kilday v. Schancupp. 91 Conn. 29.

Mrs. Kilday agreed to sell real estate to Schancupp, who, as a memorandum of the transaction, wrote out a statement reciting that the property was sold to him on certain terms. This instrument was signed by Mrs. Kilday but Schancupp's signature was not on the document unless his writing his name as the pur-

chaser constituted such signature. He defends an action brought for refusal to carry out the contract on the ground that there was no memorandum signed by him.

Held, that the writing of his name by the defendant in the body of the memorandum constituted a proper signature.

Wheeler, J.

General Statutes, 1089, provides that "no civil action shall be maintained . . . upon any agreement for the sale of real estate, or any interest in or concerning it, . . . unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent." We have said that our statute does not make agreements not made in this way invalid, but prevents their proof unless by such a writing. It is immaterial whether the action be one for specific performance, or for damages for the breach of a contract of sale of land. The proof must be in the manner provided by our statute; and the agreement in its essentials must be the same in either action.

The agreement must have been signed by this defendant, since he is the party to be charged. This agreement was caused to be prepared by the defendant and it begins, "Sold to J. Schancupp." This is the written declaration of the defendant himself that the plaintiff has sold him the property described, upon the terms described, and likewise it is his written declaration of purchase of this property upon the named terms. The statute is intended to relieve against fraud; to hold that this defendant, by writing his name in the body of this instrument instead of at its end, did not sign the instrument would help perpetrate, instead of prevent, a wrong. An instrument signed by one in any part of it after the body of it is written, or signed in any part and, when completed, produced from his custody, must be taken to be the instrument of the party so signing. Under these circumstances he authenticates by his signature, or by the signature to the instrument produced from his custody, the instrument so signed, and such a signature fully meets the requirements of the statute of frauds. The authorities are equally decisive that the signature may be printed or written. And we have held that a signature by a rubber stamp made by an agent duly authorized is a signature within the statute.

16. Effect of Non-Compliance with the Statute.

Bacon v. Parker. 137 Mass. 309.

Bacon owned a warehouse on Pearl Street in Boston, which was burned in the Great Fire. Parker and others orally agreed that if Bacon would buy the adjoining land and build a warehouse on both parcels, they would take a five year lease. Bacon put up the building on both lots, making additions and alterations at

the request of the defendants, and now sues them for failure to take the lease.

Held, that the building of the warehouse was not such performance that it would take the contract out of the operation of the statute of frauds.

Holmes, J.

It has been held repeatedly that, when a person pays money, renders service, or conveys property as the stipulated consideration of a contract within the statute of frauds, if the other party refuses to perform his part, and sets up the statute, the void contract shall not be relied on as a means to accomplish a fraud, and keep what was furnished as *quid pro quo* for nothing. The fact that words were spoken in the form of a contract which did not bind the speaker and which is repudiated, is not allowed to displace or override the obligation which would otherwise arise from the receipt and retention of value on the understanding that value is to be returned.

These cases, however, do not apply when that which has been done is not the contemplated consideration of any promise, void or otherwise, but merely a step taken by one party as a means to enable him to furnish the consideration. The mode in which one party to a bargain shall enable himself to do what he has agreed to do, is no concern of the other party, and is no part of the contract. In the present case, what the defendants were to have was a five years' lease of certain land with certain structures upon it; what they were to pay was rent. If the structures had been built by trespassers, the plaintiff would still have tendered the whole consideration stipulated for, if he had tendered a lease in due time. What the defendants agreed to pay for was the right to occupy the land when built upon, not the purchase or erection. That was the only thing they requested in such a sense that the law could found a promise upon their act. A request is only important when it implies a promise to pay for the thing requested. The request to purchase or build did not imply a promise to pay for doing either, because both were simply means enabling the plaintiff to furnish the defendants what they were to pay for. That they have never had, and therefore they are not bound to pay anything.

III.

CONSIDERATION.

Consideration, the *quid pro quo* required in all contracts except contracts under seal, in which the binding assent of the parties exists at law regardless of consideration, is any benefit to the promisor or detriment to the promisee. The amount and nature

of this benefit or detriment are immaterial, so long as the parties change their legal position. Formerly a distinction was made between "good" and "valuable" consideration. Good consideration, otherwise known as "consideration of blood," was based on natural affection assumed to be inherent in any agreement between near relatives regardless of tangible benefit or detriment. At the present time, the idea of good consideration has practically disappeared and the courts recognize only valuable consideration, i.e., actual benefit or detriment.

Any valuable consideration will support a contract regardless of the relative value of the goods or services exchanged, except

- (1) in the case of the exchange of even values, generally money values, when inadequacy of consideration is a defense;
- (2) in equity, where specific performance will not be granted if the consideration is inadequate.

Consideration may consist of a promise to do, or to forbear from doing, any act which one can legally do. Doing what one is bound to do is as a rule no consideration. Such a promise to do what one is bound to do often takes the form of part performance of an obligation in consideration of a release of the remainder. Such a release is not good unless the release is under seal, unless it represents a compromise of an unliquidated claim, or unless something additional to the original obligation is done or promised. This rule does not apply to a debt not yet due. Courts uphold compositions with creditors (agreements whereby the debtor meets his obligations by paying each creditor a certain proportion of his debt) upon the somewhat unsatisfactory theory that the consideration is to be found in the agreement of all the creditors or in the efforts of the debtor to secure the composition. This proposition rests ultimately upon broad grounds of public policy rather than upon technical theories of consideration. The same principle is to be found in promises of additional compensation for work already contracted to be done. The general rule is that in such cases there is no consideration for the promise of additional compensation, although some jurisdictions hold that consideration arises out of an election of the promisor to secure the actual work rather than damages for breach of contract. Yet other jurisdictions, while holding to the general rule, consider that the original contract is discharged by waiver and a new one substituted.

The consideration must be definite. It may be conditional. In this connection, an agreement to supply all that a party may order is to be distinguished from an agreement to supply all

goods that a party uses in his business. In such cases, the agreement to supply all orders is without consideration because there is no obligation to order, whereas an agreement to supply all goods used in a business requires an order if any such goods are used in the business. The consideration must usually be present or future; in general, a past consideration will not support a contract unless it was given at the request of the promisor; unless it represents a previous debt discharged by law; or unless the consideration for an entire transaction is part past and part present. Most courts hold that a contract intended to benefit a third person may within limits be enforced by that person, but by the English and Massachusetts rule, only those parties who are privy to the consideration may sue. This rule applies to subscriptions for the benefit of a third person who tries to enforce the subscription. It is generally held that such a subscription is not enforceable until some promise or act has been done by the beneficiary in accordance with it, whereupon it becomes a binding obligation on the theory that it was an offer accepted by that beneficiary. By statute, beneficiaries under insurance policies may sue upon them.

1. Nature of Consideration.

Brady v. Equitable Trust Co. 178 Ky. 693.

Dr. Brady, who was interested in a cooperage concern, overdrew the account of the company at the bank. Mrs. Brady gave a mortgage and note for \$3,000 to the bank to secure the deficiency, and in addition deposited with the bank a note of the company given to her to secure her own note. The bank forbore for more than four years to sue Dr. Brady. The plaintiff, an assignee of the first bank, sues Mrs. Brady on her note. Her defense is that as against her there was no consideration for the execution of the mortgage.

Held, that forbearance on the part of the bank to press its claim against Dr. Brady was sufficient consideration for the note.

Hurt, J.

A consideration, in a legal sense, sufficient to uphold a contract may be a benefit to the promisor or a loss, forbearance or detriment suffered by the promisee. To make a binding obligation, it is not necessary that some benefit should accrue thereby to the obligor. It is sufficient if the obligee suffers some detriment or prejudice. Indeed, there is a consideration if the promisee in return for the promise does anything legal which he is not bound

to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.

2. Good and Valuable Consideration.

Groves v. Groves. 65 Oh. St. 442.

Groves acquired title to property by a deed from his father which recited that Groves had paid \$9,165 for the land, whereas in fact he had paid nothing. Upon the death of Groves, his widow, the plaintiff, claims complete ownership of the property under a statute which provides that a widow shall have complete ownership of real estate acquired by her husband by purchase. The defendants, Groves' brother and sister, claim the estate subject to a life interest of the widow, under a provision in the statute which gives a surviving widow only a life estate in land acquired by her husband otherwise than by purchase.

Held, that the land, though really acquired by gift, must be considered to be acquired by purchase on account of the fact that the heirs cannot contradict the recitals in the deed.

Burket, J.

If the land came to Groves by purchase, his widow took it in fee, but if it came to him by deed of gift, she took it for life only, with remainder to his brother and sister.

Upon the face of the deed, as it recites a money consideration, the land came to him by purchase. In this state title to lands may be acquired in four ways, by descent, by devise, by deed of gift, and by purchase. Lands that are not acquired by descent, by devise, or by deed of gift, are acquired by purchase.

At common law a conveyance of real estate as a gift was supported by a good consideration only, but some eminent judges have held that such a deed would be valid without any consideration whatever; but the weight of authority seems not to go to that extent, although sound reason would seem to support it. Blackstone regards a deed supported by no consideration as of no effect, and as inuring to the use of the grantor only. "The consideration may be either a good or a valuable one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is therefore founded in motives of justice."

Blackstone seems to regard marriage as a valuable consideration, rather than as a good one, but marriage consummated is a good consideration, and marriage to be thereafter consummated, is a valuable consideration. Failure to note this distinction often leads to confusion.

It is clear that a deed of conveyance by a grantor to a near

relative by blood for no consideration other than natural love and affection, and so expressed in the deed, is a deed of gift under our statute of descent and distribution. If a valuable consideration, such as money or marriage to be thereafter consummated, is expressed, the title passes by purchase, and not by deed of gift.

The parties by their deed impress upon the title the character which it is to bear in the hands of the grantee, and those coming after him. If they say the consideration is good only, they thereby impress upon the title the character of a deed of gift. If they say that the consideration is a valuable one, they thereby impress upon the title the character of title by purchase.

In this case the deed expresses a money consideration, and the title is therefore on the face of the deed a title by purchase.

3. Consideration in Sealed Instruments.

Page v. Trufant. 2 Mass. 159.

The defendant, Trufant, who was living apart from his wife, gave a bond running to Page in return for which Trufant's wife released him and his estate from all claims for the support and education of their daughter. Page sues upon the bond.

Held, that actual consideration is unnecessary in a sealed instrument.

Sewall, J.

The amount of the defendant's pleas is, that the wife not being bound by her covenants in the articles of separation, and no covenants having been made by the plaintiff pursuant to his engagement, there was therefore no consideration for this bond.

Sedgwick, J.

The question, then, brought before the court is, whether the consideration for which this bond was given is sufficient to support an action upon it. Every bond, from the solemnity of the instrument, carries with it an internal evidence of a good consideration; and is to be supported in a court of law, except facts are disclosed to the court whereby the consideration appears to be immoral, illegal, or against the policy of the law. These pleadings show neither. Separate maintenance is lawful, and a bond given to secure it to a wife is meritorious, and therefore valid and binding. The defendant's pleas are insufficient.

4. Exchange of Even Values.

Schnell v. Nell. 17 Ind. 29.

Schnell's wife made a will leaving \$200 to Nell, among others. She died leaving no estate. Schnell made a written agreement with Nell and the two others, that he personally would pay

\$200 to each. The agreement contained an averment that it was executed in consideration of one cent, of the love and affection which he bore his wife, of the fact that she had done her part in the acquisition of his property, and of the fact that she had expressed her desire that the money should be paid.

Held, that a promise to pay a larger sum in consideration of a smaller sum is not valid consideration.

Perkins, J.

The consideration of one cent will not support the promise of Schnell. It is true that as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him on that ground. A moral consideration, only, will not support a promise. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds:

- (1) They are past considerations.
- (2) The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money.

Whether, if his wife in her lifetime had made a bargain with Schnell, that, in consideration of his promising to pay after her death to the persons named, a sum of money, she would be industrious and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

5. Adequacy of Consideration in Equity.

Margraf v. Muir. 57 N. Y. 155.

Mrs. Muir, ignorant of the real value of certain property fairly worth \$2000, agreed to sell it to Margraf for \$800. Margraf seeks specific performance of the contract.

Held, that equity will not decree specific performance of a contract if the consideration is unfair.

Earl, C.

This was an unconscionable contract and could not be specifically enforced on the ground of the inadequacy of the consideration. The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentations, he concealed his knowledge of the recent rise in value of the lot and took advantage of her ignorance, and thus got from her a contract to convey to him the lot for but a little more than one-third of its value. Such a contract, it is believed, has never yet been enforced in a court of equity in this country. When a contract for the sale of lands is fair and just and free from legal objection, it is a matter of course for courts of equity to specifically enforce it. But they will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or when such a decree would be inequitable under all circumstances.

Formerly, in case courts of equity refused specific performance on the ground of mere inadequacy of consideration, the party claiming performance still had his remedy by a new action in the courts of law for damages for the breach of contract, and, in such courts, mere inadequacy of consideration, not so great as to be evidence of fraud, was never a defense. This practice has, however, been changed by the Code; and, now, equitable and legal jurisdiction being united in the same court, a party can unite in the same complaint both legal and equitable causes of action arising out of the same transaction.

In this case the referee denied the equitable relief, but awarded damages for the breach of the contract, and in this he did not err, provided he adopted the proper rule of damage.

6. Forbearance.

Silver v. Graves. 210 Mass. 26.

The plaintiffs, three sisters of the defendant, Graves, executor of their father's will, sue him on his agreement that if they would withdraw from a contest of the will, which gave to the defendant \$750 and only \$100 to each of the plaintiffs, he

would "give them a sum of money that would be satisfactory." The plaintiffs withdrew their appearance, the will was allowed, and they sue to recover for breach of the agreement.

Held, that forbearance to sue is an adequate consideration, and that the consideration was sufficiently definite.

Rugg, J.

The only element left undetermined in this contract is that of price. But this is not infrequently found to be indefinite in contracts of sale and for work and labor. It is not necessary that the subject matter of such a contract should possess a price in the market or be bartered commonly in trade. It is enough if there is a reasonable value, which can be ascertained by the practical methods of trial. The difficulty of fixing the compensation is no greater than occurs in many cases.

There is no doubt that the forbearance to prosecute a genuine contest in the courts is a sufficient consideration for a promise. In order that it may have this effect, however, the intention must be sincere to carry on a litigation which is believed to be well grounded and not false, frivolous, vexatious or unlawful in its nature. The abandonment of an honest purpose to carry on a litigation, even though its character be not such, either in law or fact or both, as ultimately to commend itself to the judgment of the tribunal which finally passes upon the question, is a surrender of something of value, and is a sufficient consideration for a contract. But the giving up of litigation which is not founded in good faith, and which does violence to an enlightened sense of justice in view of the knowledge of the one making the concession, is not the relinquishment of a thing of value, and does not constitute a sufficient consideration for a contract. As was said by Morton, J., in *Mackin v. Dwyer*, 205 Mass. 492, "A threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise."

7. Part Payment of Debt Not Yet Due as Consideration.

Brooks v. White, 2 Metc. (Mass.) 283.

Brooks & Saunders held Keith, White & Company's note for \$865. Before the note became due, the plaintiffs accepted from White, one of the partners, two notes of third persons for a smaller sum in settlement of all demands. They now try to collect the balance from White.

Held, that the payment of a smaller amount before the larger amount becomes due is good consideration for a release of the larger amount.

Dewey, J.

The general principle, that the acceptance of a less sum in money than is actually due cannot be a satisfaction and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon such condition, seems to be recognized in books of unquestionable authority. The reason of the rule is that there must be some consideration for the relinquishment of the excess due beyond the sum paid; something to show a possibility of benefit to the party thus relinquishing a legal right; otherwise the agreement is *nudum pactum*. So in Pinnel's case, 5 Co. 117, where it was resolved that payment of a less sum, on the day, in satisfaction of the greater, cannot be a satisfaction of the whole, because it appears to the judges that by no possibility a less sum of money can be a satisfaction to the plaintiff for a greater sum: But the gift of a horse or the like, in satisfaction, is good; for it shall be intended that the horse might be more beneficial to the party than the money, or he would not have accepted it in satisfaction.

The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical consideration, although it was quite apparent that such consideration was far less than the amount of the sum due. Thus, where any other articles than money are received and agreed to be accepted in full satisfaction of a debt, the court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. The distinction was recognized in the resolutions in Pinnel's case, already cited. In *Boyd v. Hitchcock*, 20 Johns. 76, the receiving of a note of hand for a less sum than was due, with the name of another person as promisor or indorser, where the creditor agreed to accept the same as a satisfaction of the whole debt, was held a valid discharge, as an accord and satisfaction. In that case, the courts say, "here was a beneficial interest acquired, and a valuable consideration received by the plaintiffs, when they agreed to accept less than their whole demands."

But there is another principle which the facts in the present case authorize us to apply, which is equally fatal to the maintenance of the technical objection relied on by the plaintiffs. The same ancient authority which declares that the payment and acceptance of a less sum, on the day the debt becomes due, in satisfaction of a

greater, is no defense beyond the amount paid, also declares that the payment and acceptance of a less sum before the day of payment has arrived, in satisfaction of the whole, would be a good accord and satisfaction; for it is said, peradventure parcel of the sum before the day it fell due would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material. "If the obligor pay a lesser sum, either before the day, or at another place than is limited by the condition, and the obligee receiveth it, this is a good satisfaction." The transfer of the notes was therefore a sufficient consideration for a promise by the plaintiffs to receive them in full discharge of the note.

8. Part Payment: Effect of Voucher Check.

Whittaker Chain Tread Co. v. Standard Auto Supply Co. 216 Mass. 204.

The Auto Supply Company owed the Chain Tread Company for chains. It paid the bill by a voucher check "in full settlement." The check contained a statement that credit was claimed for certain chains, and a further statement that if the items were incorrect, the check should be returned with explanation by return mail. The Auto Supply Company was not entitled to the amount it deducted from the bill, and in a suit by the Chain Tread Company for the balance due, the question arises whether the plaintiff, having accepted the check, can sue for the remainder.

Held, that the taking of a check will not prevent collection of the remainder of the amount due, when there is no consideration for any release.

Loring, J.

In *Day v. McLea*, 22 Q.B.D. 610, it was decided by the Court of Appeal in England that a creditor who cashes a check sent in full settlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account.

But the true rule is to the contrary. The true rule is put with accuracy in *Nassoij v. Tomlinson*, 148 N.Y. 326, in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all, it was *cum onere*. When he indorsed and collected the check, referred to in the letter asking him to sign the enclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered."

But in cases (like the case at bar) where there is a dispute as to the amount due under a contract and payment of an amount which

he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who under these circumstances accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict.

The decision in most of these cases was made to turn upon the question whether payment of the amount admitted to be due without dispute did or did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition and so took the part admittedly due in full discharge of the whole debt. But while the doctrine of election is sound where a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of what he admits to be due conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on the condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant on the seventh month sent the stipulated amount of iron but on condition that the plaintiff should pay double the stipulated price, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract price for the instalment sent was void and that the plaintiff under those circumstances is not put to an election but can keep the iron under the contract? There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what admittedly was due a void condition that it be received in full discharge of what was in dispute.

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights and that it has not agreed to accept it in full settlement of the balance of the account.

9. Part Payment Accompanied by Other Benefit or Detriment.

Roberts v. Banse. 78 N. J. L. 57.

Roberts sued Banse for slander, and recovered a judgment of \$75 against him. He afterwards took \$20 in full satisfaction, thereby causing Banse to drop an appeal which he contemplated taking. He now sues for the remainder.

Held, that receipt of a smaller sum in consideration of the release of a larger debt is good consideration if accompanied by some other detriment.

Garrison, J.

There would be no question as to the defendant's right to have this judgment canceled were it not for the legal rule, that the payment of a less sum in satisfaction of a larger one is no satisfaction. This rule, however, "has been constantly departed from upon slight distinctions" as is generally the case with a technical rule that is not, on the whole, conducive to sound morals.

To many other grounds of departure that have been recognized there should be added: that if the debtor, in addition to the payment of a part of the debt as an agreed satisfaction of the whole, does at the request of his creditor some substantial thing of detriment to his interests, that he was not bound to do, upon the mutual understanding that it was an additional consideration for the creditor's promise to accept the less for the larger sum, legal effect may be given to such compact of the parties if the debtor has fully performed his part thereof to his detriment. Both on the ground of a new consideration and on that of estoppel, an agreement thus made and performed should obtain legal consideration.

10. Compromise of Amount Due.

Donohue v. Woodbury. 6 Cush. (Mass.) 148.

Donohue had a claim against Woodbury for labor. There was a dispute as to the amount owing, and Woodbury offered \$35 to the attorney for the plaintiff, which was accepted without comment. The action is brought to recover the balance claimed by Donohue.

Held, that a compromise of an unliquidated amount due constitutes valid consideration.

Shaw, C. J.

The rule is well settled, that the payment of a part of a debt, though offered in satisfaction, is not a payment of the whole, and

is no defense to an action for the balance. But that rule applies strictly to a case of debt, or a claim for a liquidated amount. It does not apply to an unliquidated claim for damages. Originally, the present was a claim for services, and was for unliquidated damages. Some services were admitted to have been rendered, but the amount was denied; and an offer was made of a less sum than that claimed. The case was open to two inquiries, first, as to the time of service, and second, as to the rate. The offer therefore of \$35 was both to liquidate the claim and pay that sum in satisfaction; the acceptance of the offer fixed and liquidated the sum, and discharged it.

II. Compositions with Creditors.

White v. Kuntz. 107 N. Y. 518.

J. and L. F. Kuntz made an assignment for the benefit of their creditors. White, the plaintiff, a creditor to the extent of about \$18,000, received notes indorsed by the assignee to the amount of about \$6,000, pursuant to a composition agreement assented to by White in consideration of a secret collateral agreement for the repurchase of these notes by the assignee for \$10,000. White now sues on that agreement.

Held, that in a composition with creditors, an agreement whereby one creditor receives more than the others, is void.

Earl, J.

It is a general rule of law that the acceptance of a lesser sum, or an agreement to accept it, does not bar a demand for a greater sum. There is an exception to this general rule, however, in the case of a composition by a debtor with his creditors, in which they agree to accept less than their entire demands. Such an agreement, if entered into by a debtor with a number of his creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertaking of the rest as a consideration for his own undertaking. "Where creditors thus mutually agree with each other, the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his own claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive by putting it out of the power of the debtor to carry out the composition." "Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all

the debts then owing to the creditors who sign the deed." It is, therefore, held that every agreement made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts, is fraudulent and void. So scrupulous are courts in compelling creditors to the observance of good faith toward one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative; and no contract to pay money or do any other valuable thing, and no security, given upon any such promise, whereby a creditor obtains an advantage peculiar to himself, can be enforced.

12. Doing What One is Bound to Do.

Pool v. The City of Boston. 5 Cush. (Mass.) 219.

Pool, a watchman of the city of Boston, while in the discharge of his duty as such, discovered a person setting fire to a building and secured his conviction. He claims a reward offered by the city government for the detection and conviction of any incendiary.

Held, that a person is not entitled to a special reward for acts done in accordance with his duty.

Wilde, J.

The defense to this action is, that the plaintiff has done no more than it was his duty as a watchman to do, and that a promise of a reward to a man for doing his duty is illegal, or void for want of consideration. The same principle has been applied to promises made to persons not public officers.

So it has been decided that a promise of extra compensation to a witness, in case he would attend court and give testimony, at considerable expense and inconvenience to himself, was void, and that he could only recover his fees allowed by law, he having done no more than he was duty bound to do.

These decisions, and the principles on which they are founded, are decisive against the plaintiff's claim in the present case; it was his duty, when on the watch he discovered Hollihan setting fire to the outhouse, to make complaint and cause him to be arrested, or to give notice to the mayor, or some other city officer, that they might prosecute him. He preferred himself to prosecute rather than to give notice to the city authorities; doubtless with the hope of entitling himself thereby to the large reward offered. But this will not help him. The principal object of the reward offered was to obtain the detection of the offender; the conviction was required to ascertain who was the offender. But to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the

detection as for the conviction of the offender. The reward cannot be apportioned. But the plaintiff is not entitled thereto for either service. He discovered the offender while he was on duty as a watchman, and was bound to give notice, or to cause him to be arrested; and he preferred the latter course, but he could not thereby subject the defendants to a liability to which they would not be subject if he had given notice to some one of the city officers.

13. Promise of Additional Compensation. (General Rule.)

Parrot v. Mexican Central Railway Co. 207 Mass. 184.

The plaintiffs sue to recover unexpected expenses incurred by them in the production of a book called "The Sportsman's Guide Book of Mexico." The terms for the publication of the book were contained in a written contract made by the defendant railroad, but subsequently the representatives of the road orally agreed to pay an additional sum towards expenses. It is this sum that the plaintiffs seek to recover.

Held, that upon the facts of the case, there was no consideration for the subsequent agreement.

Knowlton, C. J.

The defendant contends that there was no consideration for the promise to pay money to the plaintiffs, because they were already bound by the writing to do all that they undertook to do under the oral agreement. As a general proposition, it is settled in this Commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. It has often been said that the principle involved is the same that lies at the foundation of the doctrine that a promise to accept or pay a less sum in discharge of a debt for a greater amount is not binding.

A limitation of the general proposition has been established in Massachusetts in cases where a plaintiff, having entered into a contract with the defendant to do certain work, refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation is not intended to affect the rule that a contract cannot be binding without a consideration; but it rests upon the doctrine that, under these circumstances, there is a new consideration for the promise. In *Rollins v. Marsh*, 128 Mass. 116, the court said: "The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she would not fulfill unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had

for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement." In such a case, the new promise is given to secure the performance, in place of an action for damages for not performing, as was pointed out by this court.

This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the states in this country. While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it. A majority of the court are of the opinion that it is not applicable to the evidence in this case, and that the defendant is right in its contention that, upon the assumption that the parties were bound by the written contract, there was no consideration for the new promise of the defendant.

14. Promise of Additional Compensation. (Conflicting Rule.)

Moore v. Detroit Locomotive Works. 14 Mich. 266.

The Detroit Locomotive Works failed to fulfill an agreement to manufacture and deliver a locomotive to Moore, Smith & Company within a specified time. Three or four months later delivery was offered and accepted upon a new agreement whereby Moore, Smith & Company waived all claim for damages for non-delivery. The Detroit Locomotive Works now sues for the price, and Moore, Smith & Company seek to recoup damages for non-delivery.

Held, that the delivery was sufficient consideration to support the agreement for waiver.

Cooley, J.

There are several cases which hold that where a party abandons a contract, and the other party promises that if he will go on and complete it, a further compensation shall be made beyond what was originally agreed, such promise is based upon sufficient consideration, and may be enforced. In *Munroe v. Perkins*, 9 Pick. 298, the plaintiff had agreed by deed to erect a building for defendants. Finding his contract a losing one, he had concluded to abandon it, but resumed work on the oral promise of the defendants that, if he would do so, they would pay him what the work was worth, without regard to the contract. The court say that whether the parol promise was without consideration "depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went on, on the faith of the new promise, and finished the work. This was a sufficient consideration. If defendants were will-

ing to accept his relinquishment of the old contract, and proceed on a new agreement, the law, we think, would not prevent it."

In *Lattimore v. Harsen*, 14 Johns. 330, the plaintiffs had entered into an agreement under seal to perform certain work under a penalty, and were afterwards released by defendant by parol from a further performance under the agreement, he promising them that if they would go on and complete the work, he would pay them for their labor by the day. The court held, that as the plaintiffs might have released themselves from the agreement by incurring the penalty, there was a sufficient consideration for the promise of the defendant, and that the plaintiffs might recover under the substitute agreement.

In *Lawrence v. Davey*, 28 Vt. 264, there was a contract to deliver coal at specified times and rates. A portion of it was delivered, and plaintiff then informed defendant that he could not deliver at those rates, and if the latter intended to take advantage of it, he should not deliver any more; and that he should deliver no more unless the defendant would pay for the coal independently of the contract. The defendant agreed to do so, and the coal was delivered. On suit being brought for the price, the court say: "Although the promise to waive the contract was after some portion of the coal sought to be recovered for had been delivered, and so delivered that probably the plaintiff, if defendant had insisted upon strict performance of the contract, could not have recovered anything for it, yet nevertheless, the agreement to waive the contract, and the promise, and above all, the delivery of coal after this agreement to waive the contract, and upon the faith of it, will be a sufficient consideration to bind the defendant to pay for the coal already received."

Each of these cases is to the point now in issue before us. It is true that in each the abandonment of the contract by the plaintiff was before very much had been done under it, and on the claim that the bargain was a hard one upon him. But neither of these circumstances can distinguish the cases from the present. An unprofitable contract is not, by that circumstance, made any the less binding on the promisor; and the promisee has the same right and the same power to discharge a contract in consideration of a new promise, after breach as before. A different case would be presented if the plaintiffs had relied upon an agreement to waive the damages made after delivery; for in that case nothing would have remained for them to do or to promise which could be a consideration for the waiver. But here, although they had done the work which enabled them to deliver the engine, they refused altogether, according to their statement, to go further, except under the substituted agreement; so that the plaintiffs in error actually received the property under the promise which they now insist is invalid. If they regarded it for their interest at the time to make the arrangement, and have obtained the property under it, it is not in our power now to set it aside on the ground of their being entitled to just as much under the contract before existing. They knew their legal rights at the time, and must be supposed to have consulted their own interests in entering into the new arrangement.

15. Additional Promise by Third Party.

DeCicco v. Schweizer, 221 N. Y. 431.

Schweizer executed a contract whereby he agreed to pay \$2,500 a year as a marriage settlement to his daughter, then engaged to Count Gulinelli. After ten years, he refused to make further payments under the agreement, and the plaintiff, an assignee of the contract, sues for payments due.

Held, that a promise by one person to pay a certain sum for the performance of a contract between third parties, rests upon a valid consideration.

Cardozo, J.

That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfilment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is a general acceptance of the proposition that where A is under a contract with B, a promise made by one to another to induce performance is void. The trouble comes when the promise to induce performance is made by C, a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C in return for a new promise by A, and a promise by C in return for performance by A. Some jurists hold that there is consideration in both classes of cases. Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance. Others hold that there is no consideration in either class of cases.

The courts of this state are committed to the view that a promise by A to B to induce him not to break his contract with C is void. If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A, not merely to B, but to B and C jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral, it is unilateral.

The situation is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forebore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract

it. The distinction between a promise by A to B to induce him not to break his contract with C, and a like promise to induce him not to join with C in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B solely, and not to B and C jointly. The criticism has been made that in such circumstances there ought to be some evidence that C was ready to withdraw. Whether that is true of contracts to marry is not certain. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct.

Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these were the "consideration" for the promise. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit.

16. Conditional Consideration.

Higbie v. Rust, 211 Ill. 333.

Rust agreed to sell Higbie all the five-pound jelly pails he might want at 40c per dozen, *f. o. b.* Keene, N. H. Rust subsequently advanced the price and refused to fill orders for Higbie as agreed.

Higbie claims that Rust was obliged to furnish him with all the pails he might want for his trade.

Held, that an agreement to sell all the goods of a particular description that a party may want or order is without consideration.

Scott, J.

It will be observed that both by the conversation at Keene and the letter relied upon, Rust stated that he would furnish all the pails that Higbie "wanted." If it be conceded that the latter accepted this proposition, we think the contract cannot be enforced, for the reason that it is lacking in mutuality. By its terms Rust would be obliged to sell, but Higbie would not be obliged to buy. The fact that Higbie was an extensive dealer in pails, supplying many customers, does not alter the situation. He might elect to sell no five-pound pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want such pails as he might sell to his trade, or to take or want any pails whatever.

Where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or, what quantity he will want, the contract is void for lack of mutuality.

Plaintiff in error regards the case, *National Furnace Co. v. Keystone Manufacturing Co.*, 110 Ill. 427, as supporting his position. In that case, the Keystone Manufacturing Company was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its affairs, and contracted for all the iron, at a fixed price, which it would need in its business during the ensuing year, and the National Furnace Company agreed to furnish the same at that price. In that case, there was something by which to measure the needs of the purchaser and fix the amount of the commodity to be delivered under the contract, viz., such quantity as should be needed during the year in the manufacturing business which the purchaser was then conducting and in which it was certain some quantity would be needed. Here there is no method to determine what quantity, if any, the purchaser would want, as his wants would be measured by his sales and so far as Rust was concerned, would only exist if he, Higbie, was unable to purchase elsewhere at a better price.

17. Past Consideration.

Roscorla v. Thomas. 3 Q. B. (Eng.) 234.

Roscorla bought a horse from Thomas without any warranty. Thomas subsequently warranted the horse, and Roscorla now sues on the warranty.

Held, that the executed consideration for the sale of the horse would not support the subsequent promise.

Lord Denman, C. J.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express: and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

18. Moral Obligation as Past Consideration.

Freeman v. Robinson. 38 N. J. L. 383.

Robinson's firm sold goods to Freeman's minor son, without order or consent of Freeman, who, nevertheless, later promised to pay the bill. They now sue Freeman for the amount.

Held, that as in New Jersey the duty of a father to provide maintenance for his son is a mere moral obligation, there is no consideration to support the promise to pay.

Depue, J.

In *Hawkes v. Saunders*, Cowp. 290, Lord Mansfield said that, "where a man is under a moral obligation, which no court of equity or law can enforce, and promises, the honesty and rectitude of the thing is a consideration." And Justice Buller declared the true rule to be that "wherever a defendant is under moral obligation, or is liable in conscience and equity to pay, that is sufficient consideration." The influence of these great names induced the opinion, which at one time prevailed, that a mere moral obligation, under all circumstances, was a sufficient consideration for an express promise. Subsequent examination of this doctrine, in the light of legal principles, has led to a modification of this opinion, and a repudiation of the principle in its generality of application.

In an elaborate note to *Wennall v. Adney*, 3 B. & P. 247, it is observed, that Lord Mansfield "used the term moral obligation not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would

be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that instance from legal liability." The justice of this observation is apparent from the cases stated by the Chief Justice as illustrations of the application of the doctrine. He enumerates promises to pay debts, the recovery of which is barred by the statute of limitations; a promise by a man after he becomes of age to pay a just debt contracted during minority, but not for necessities; a promise by a bankrupt after his certificate to pay his debts in full; and a promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In each of these instances there was, originally, a consideration of benefit to the promisor, from which a promise would have been implied capable of legal enforcement, if some statutory provision or positive rule of law had not debarred the party from legal remedy. Indeed, in the case then in hand, which was an action on a promise by an executrix, into whose hands assets had come, more than sufficient to pay debts and legacies, to pay the plaintiff his legacy, the defendant had received a consideration with respect to which a remedy might have been had by action, were it not for a technical rule of law.

In the note referred to, the conclusion is arrived at from an examination of all the cases, that "an express promise can only receive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

It may now be considered as the settled law, established on principle and authority, that a mere moral obligation or duty, as an executed consideration, is not a sufficient consideration to support a subsequent express promise. If services be rendered at the request of the promisor, which are for the benefit of a third party towards whom the promisor owes only moral duties, they may be recovered for. In such cases, the precedent request and services rendered in compliance therewith afford a consideration from which a promise to pay would be implied, or such as is needed to uphold an express promise. But where the duty is one of moral obligation only, and the service is rendered without a previous request, a subsequent promise to pay is without the consideration which is necessary to the validity of the contract.

19. Past Consideration in Case of Debt Discharged by Law.

Herrington v. Davitt. 220 N. Y. 162.

Davitt made a note to the plaintiff. He afterwards went into bankruptcy and effected a composition with his creditors. After that composition was accepted by the plaintiff, Davitt promised her to pay the debt.

Held, that a previous obligation will support a subsequent promise to pay, if the original obligation has been discharged by a rule intended for the debtor's advantage.

Collin, J.

The debtor does not promise to pay the debt discharged in bankruptcy, unless there is a distinct and unequivocal expression by him, by a writing of the prescribed form, of a clear intention to bind himself to its payment. The acknowledgment of the existence of the debt by the payment of a part of it or interest upon it or by express written words is not sufficient. For the purpose of creating anew the liability, the law does not imply a promise. The promise need not be made to the creditor, but it must with certainty refer to the debt. No particular form of words need be used. The promise is constituted by words which, in their natural import, express the present intention to obligate or undertake to pay. The payment may, however, depend upon a contingency or condition. If so dependent, it must be proved that the contingency has happened or the condition has been performed. A promise made at any time after the adjudication, and, perhaps, after the filing of the petition, is actionable.

The letter of the defendant's testator constituted a distinct and unqualified promise to pay the debt.

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. The appellant asserts that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the creditors seeking to enforce the unpaid debt. The clear weight of judicial opinion and correct reasoning declare such assertion erroneous. In *Cohen v. Lachenmaier*, 147 Wis. 649, the Supreme Court of Wisconsin said: "It is further contended that each promise, if made, is *nudum pactum*, because the plaintiff as one of the creditors joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law, but is one effected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise, and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt."

The adequate consideration was the moral obligation to keep the original promise; this rule does not apply to a composition *inter partes* which derives its validity merely from the will of the parties; and if a debt is legally discharged by the voluntary act of the party, there remains no obligation which can be deemed a consideration for a promise; a discharge by performance of the terms of a bankruptcy composition, is a discharge by operation of law; the composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law.

20. Consideration Part Past and Part Present.

Blackwell v. Kercheval. 27 Ida. 537.

Blackwell sold certain stock for Kistler, and without authority took in payment a note instead of cash. Kistler agreed to hold Blackwell harmless in respect of this unauthorized act, upon Blackwell's agreement to continue to attempt collection of the amount due. In a suit by Blackwell against Kistler's administrator to enforce this contract, it was urged in defense that there was no consideration for the agreement to hold Blackwell harmless.

Held, that the request for continuance of Blackwell's efforts to collect would support a promise to be responsible for those in the past.

Budge, J.

Where there is a request to continue services of a character theretofore rendered, the continuance of such services is a sufficient consideration to support a promise to pay for those rendered prior to such request. It is quite certain that the request to perform the services, coupled with the promise to pay for them, takes the case out of the rule that no action will lie for services rendered voluntarily or performed gratuitously, and that the same facts take the case out of the rule declaring an executed consideration to be insufficient to support a promise. Whatever may be thought of the reasoning of some of the earlier English cases, it cannot be denied that the conclusion that where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one, and will support a promise to pay for such services, although some of them were rendered prior to the request.

An entire promise founded partly on a past and executed consideration and partly on an executory consideration, is supported by the executory consideration.

"A consideration which is executed in part only is called a continuing consideration and is valid, the executory portion of it being sufficient to support the entire promise."

21. Privity to Consideration. (Majority Rule.)

Seaver v. Ransom. 224 N. Y. 233.

Ransom was executor of the estate of Beman, who had promised his wife when she was about to die, that if she would not change her will, he would himself leave certain property to Miss Seaver, as Mrs. Beman had herself intended to do. This Beman did not do, and Miss Seaver sues on the agreement, as one for whose benefit it was made. (In New York, by statute, husband and wife may contract together except in regard to relieving the husband from liability to support the wife.)

Held, that the person for whose benefit a contract is made may sue upon it in New York.

Pound, J.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. The general rule, in both law and equity, was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party and, therefore, it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit, has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and it is said to be "the prevailing rule in this country." It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule that a contract cannot be enforced by or against a person who is not a party. In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined, first, to cases where there is a pecuniary obligation running from the promisee to the beneficiary; "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit": secondly, to cases where the contract is made for the benefit of the wife, affianced wife, or child of a party to the contract. The close relationship cases go to the early King's Bench case (1677), long since repudiated in England, of *Dutton v. Poole*, 2 Lev. 210. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of *Borland v. Welch*, 162 N. Y. 104, 110.

The right of the third party is also upheld in, thirdly, the public contract cases where the municipality seeks to protect its inhabitants by covenants for their benefit and, fourthly, the cases where, at the request of the party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration. It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

On principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff \$6,000 and he had accepted the devise, he would have become personally liable to pay the legacy and plaintiff could have recovered in an action at law against him, whatever the value of the house. That would be because the testatrix had in substance bequeathed the promise to the plaintiff and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract.

22. Privity to Consideration. (Minority Rule.)

Exchange Bank of St. Louis v. Rice. 107 Mass. 37.

Hill, at St. Louis, consigned cotton to the defendants in Boston and drew on them a draft for \$3,300, payable to the order of Pitman & Company. The draft was indorsed by Pitman & Company to the plaintiff bank, which discounted it and presented it before maturity to the defendants, who refused to accept it in spite of the fact that they had written Hill that they would honor the draft.

Held, that the plaintiff cannot recover for the reason that it was not a party to the consideration.

Gray, J.

The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter.

The first and principal exception to the general rule, consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication from his acceptance of the money

or property without objection to the terms on which it is delivered to him, to pay such creditors.

The only illustration which the decisions of this court afford of the second class of exceptions, is *Felton v. Dickinson*, 10 Mass. 287, in which it was held, in accordance with a number of early English authorities, and hardly argued against that a son might sue upon a promise made for his benefit to his father.

The third exception is the case of *Brewer v. Dyer*, 7 Cush. 337, in which the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor accordingly to its terms, entered into possession of a shop with the lessor's knowledge, paid him the rent quarterly for a year, and then before the expiration of the lease left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. That case may perhaps be supported on the ground that such payment and receipt of the rent after the agreement between the defendant and the lessee warranted the inference of a direct promise by the defendant to the lessor to pay the rent to him for the residue of the term. It certainly cannot be reconciled with the later authorities, without limiting it to its own special circumstances, and affords no safe guide in the decision of the present case.

In the case at bar, the plaintiffs had acquired no title in the cotton against which the draft was drawn. The bill of lading was not attached to the draft, or made payable to the holder thereof, or delivered to the plaintiffs. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendants and the drawer, at the time of their receipt and sale of the cotton, and ever since, was in favor of the defendants. There is no ground therefore for implying a promise from the defendants to the plaintiffs to pay to them either the amount of the draft or the proceeds of the cotton. The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration for the defendants' promise moved from the drawer and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs: and there is no proof that the defendants authorized that promise to be shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested in behalf of the plaintiffs, that he was their agent in receiving the defendants' promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an evasion of the rules of the law, which will not allow any person, who took the draft before that promise was made, to maintain an action upon that promise, either as an acceptance or a promise to accept.

23. Subscriptions.

The Presbyterian Church v. Cooper. 112 N. Y. 517.

Cooper was administrator of the estate of Cook, who had signed a subscription paper promising \$5,500 for the purpose of paying off a mortgage on the Church. The Church sues to recover the amount of the subscription.

Held, that a subscription for charitable or other purposes is not enforceable for want of consideration.

Andrews, J.

It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant.

In the disposition of this case we must, therefore, reject the mutual promise between the subscribers, because there is no privity of contract between the plaintiff and the promisors. Some consideration must, therefore, be found other than that expressly stated in the subscription paper, in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services, rendered by one party at the request of another, constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view.

Leaving out of the subscription paper the affirmative statement of the consideration (which, for reasons stated, may be rejected),

it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied.

IV.

CAPACITY OF PARTIES.

The parties to a contract must be under no legal incapacity. While all persons are in a sense capable of contracting, there are certain relative disabilities extending to infants, insane persons, and in some measure to married women.

Some contracts of an infant are valid, most of them are voidable, and in certain jurisdictions a few are void. The following contracts of an infant are binding:

1. Executed contracts for the purchase of necessities, which are strictly speaking quasi contracts: the law imposes the obligation regardless of contractual capacity. The circumstances of the infant determine what are necessities. Money itself is not a necessary unless expended under the direction of the lender for necessities.
2. A contract which an infant may be compelled to execute by equity or by authority of law.
3. An executed contract beneficial as a matter of law to an infant who is unable to restore the other party to his original position.

In most jurisdictions, all other contracts of an infant may be rescinded by him at will. Some jurisdictions consider a few contracts of an infant, particularly those concerning the appointment of an agent, void. There is also a rule in some courts that when an infant has made a contract beneficial to himself, he cannot rescind unless he returns the consideration. Other jurisdictions hold that an infant may rescind even those contracts without returning the consideration unless he has it, and unless it is a contract which by law may be pronounced to be for his benefit.

Upon reaching his majority (the age of twenty-one in most states), the infant must ratify or disaffirm a voidable contract previously made.

Ratification may be express or by conduct. No particular form of ratification is required except in those jurisdictions where the matter is regulated by statute. Mere lapse of time after coming of age, coupled with enjoyment of the proceeds of the contract,

is sufficient to warrant an inference of ratification. The person must know all facts connected with the contract ratified, but this requirement does not ordinarily extend to the necessity of knowledge of the right to rescind. Mere acknowledgment of a debt does not constitute ratification.

The protection which the law gives to an infant does not relieve him from responsibility for his torts. An infant is liable for all torts which do not arise out of the subject matter of a voidable contract.

Contracts of insane persons are considered upon much the same basis as contracts of infants. In order that insanity shall affect contractual capacity, it must prevent the mind of the insane person from freely meeting with that of the other party upon the subject matter of the contract. Insane persons are liable for necessities, and are bound by contracts which they may be compelled by law to execute. If there has been an adjudication of insanity, their contracts are entirely void in most jurisdictions, while contracts made prior to such adjudication are merely voidable. An insane person's contracts may be ratified or avoided by him upon his recovering sanity and upon his death may be ratified or avoided by his heirs and representatives whether he has recovered sanity or not. Knowledge of insanity by the other contracting party is immaterial; but many jurisdictions consider that an insane person may not disaffirm a contract without returning the consideration.

The disability of married women has now been almost entirely removed by statute in most jurisdictions. Formerly a married woman could not contract unless her husband was civilly dead or had abandoned the country. At the present time, married women are still unable to contract with their husbands, unless the right has been specifically given by statute, as in New York. Apart from this restriction, enabling statutes passed in practically all states have brought it about that a woman's contractual rights are not affected by marriage.

A. Contracts of Infants.

I. Contracts of Infants in General.

Riley v. Mallory. 33 Conn. 201.

Riley, a minor, bought a gun from the defendant Mallory. After he has used the gun for some time, he attempts to disaffirm the contract and secure the return of his money.

Held, that most contracts of an infant are voidable, and may be rescinded at his election.

Butler, J.

The privilege of an infant to avoid contracts which are injurious to him, and rescind those which are not, is not an exception to a general rule, but a general rule with exceptions. The law assumes the incapacity of an infant to contract. It also recognizes the fact that the limitation of infancy is arbitrary; that it is indispensably necessary that an infant should be at liberty to contract for necessities; and that he may happen to make other contracts which will be beneficial to him. It does not therefore forbid him to contract, but gives him for his protection the privilege of avoiding contracts which are injurious to him and rescinding all others, whether fair or not, whether executed or executory, and as well before as after he arrives at full age—excepting from the operation of the privilege only contracts for necessities, contracts which he may be compelled in equity to execute, and executed contracts where he has enjoyed the benefit of them and cannot restore the other party to his original position. These exceptions are founded in the necessities of the infant, or required by a just regard for the equitable rights of others.

2. Contracts for Necessaries.

Tupper v. Cadwell. 12 Metc. (Mass.) 559.

Tupper repaired a dwelling house for Cadwell, a minor, such repairs being necessary to prevent immediate and serious injury to the house. In a suit for payment, Cadwell defends on the ground of infancy.

Held, that this is not a case of “necessaries” for which an infant is liable.

Dewey, J.

An infant may make a valid contract for necessities; and the matter of doubt in the present case is, what expenditures are embraced in the terms “necessaries.” It is said, an infant may bind himself to pay for his necessary meat, drink, apparel, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards. The term “necessaries,” it is well settled, also embraces necessary articles for the support of his wife and children, if he has such to maintain. The wants to be supplied are, however, personal; either those for the body, as food, clothing, lodging, and the like; or those necessary for the proper cultivation of the mind, as instruction suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood.

It has sometimes been contended that it was enough to charge

the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if, by it, it be intended to sanction an inquiry, in each particular case, whether the expenditure, or articles contracted for, were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditures are included in this class is a matter of law, to be decided by the court. The further inquiry may often arise, whether expenditures, though embraced in this class, were necessary and proper in the particular case; and this may present a question of fact.

No necessity can exist for expenditures [upon real estate of the character and under the circumstances here stated] solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes occasion for the appointment of a guardian.

3. Executory Contracts for Necessaries.

Gregory v. Lee. 64 Conn. 407.

Lee, a minor student at Yale University, hired a room from Gregory for the college year of forty weeks. After occupying the room for three months, he gave it up, and the plaintiff brings this action against him for the rent for the balance of the term.

Held, that an infant may repudiate an executory contract whether for necessities or not.

Torrance, J.

This room at the time the defendant hired it, and during the time he occupied it, came within the class called "necessaries," and also to him during said period it was an actual necessary; for lodging comes clearly within the class of necessities, and the room in question was a suitable and proper one, and during the period he occupied it, was his only lodging room. "Things necessary, are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt."

So long then as the defendant actually occupied the room as his sole lodging room it was clearly a necessary to him, for the use of which the law would compel him to pay; but as he paid the agreed price for the time he actually occupied it, no question arises upon that part of the transaction between these parties.

The question now is whether he is bound to pay for the room after December 20th, 1892. The obligation of an infant to pay for necessities actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction

of a *quasi* contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. And where an infant agrees to pay a stipulated price for such necessities, the party furnishing them recovers not necessarily that price but only the fair and reasonable value of the necessities. This being so, no binding obligation to pay for necessities can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessities.

As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether beneficial to him or not, and whether executed or executory. The alleged agreement in this case does not come within any of the recognized exceptions to this rule. In this case the defendant gave up the room and repudiated the agreement, so far as it was in his power to do so, in the most positive and unequivocal manner.

The plea of infancy then, under the circumstances, must prevail.

4. Money as a Necessary.

Kilgore v. Rich. 83 Me. 305.

Kilgore, at the request of Rich, an infant, paid for him a board bill which he had previously contracted while attending school. In a suit for this money, Rich pleads infancy as a defense.

Held, that, while money loaned is not a necessary, money expended for necessities for an infant, at his request, represents a binding obligation.

Peters, J.

It was ruled at the trial that an infant being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noted any case that opposes the principle. It was held that an infant who was threatened with arrest upon a process sued out against him on a debt for necessities, would be liable to a person who, at his request, advanced money to release him. In that

case there was legal pressure, but in many instances moral pressure would be great. Where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill and paid it when it became due, they were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So a person who signed an infant's note given for necessities, as a surety, was allowed after payment of the note to recover the amount paid; not upon the note, but as money paid for the benefit of the infant.

The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. But one who pays money at his request to a third person for necessities can recover it. The difference is between lending and paying. The doctrine adopted in late American cases, [is] that a person who lends money to an infant to purchase "specific" necessities stands in the position of the tradesman who furnishes the necessities.

5. Contracts Which an Infant may be Compelled by Law to Perform.

Elliott v. Horne. 10 Ala. 348.

James Cobb, in order to defraud his creditors, took title to a piece of property in the name of his son, John, a minor. Later, John, at the direction of his father, executed a deed to Herndon, a creditor of the father, through whom one of the parties claims. The other parties claim under a later deed from John Cobb after he came of age.

Held, that the deed to Herndon was good, as it was a conveyance which the infant could have been compelled by law to make.

Ormond, J.

Here the infant, though the legal title was cast upon him by the fraudulent conduct of his father, had no right to the land against a creditor, or purchaser; when, therefore, he conveyed to the purchaser from his father, he merely parted with the naked title, and only did that which a court of equity would have compelled him to do, and we are unable to perceive any reason for permitting him, by a disaffirmance of this act, to reinvest himself with the title to be again deprived of it.

We do not understand the law to be that every act of an infant, though it be by deed, is voidable at his election on his attaining his majority. It is an ancient maxim of the common law, that "generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." This point was so determined in the case of an infant mortgagee, in whom the title was vested, who, upon the payment of the mortgage debt to

the persons entitled to receive it, made a re-conveyance of the land, and the court held, that as this was an act which by law he could be compelled to perform, his voluntary performance of it, though during minority, should bind him, and he could not afterwards disaffirm it. We are aware that this celebrated judgment has been the subject of some critical animadversion, on account of some of the general positions advanced by Lord Mansfield. The true point of the case has never been seriously questioned, but is admitted to be law by the highest authority at the present day.

6. Contracts of Which an Infant has Enjoyed the Benefit.

Breed v. Judd. 1 Gray (Mass.) 455.

Breed, a minor, seeks to recover money paid by him to the defendants, under an agreement whereby they furnished an outfit to enable him to go to California, and received one-third of his earnings while he was away.

Held, that having executed a contract beneficial to him as a matter of law, an infant cannot afterwards disaffirm it.

Thomas, J.

Not having means of his own, he enters into an arrangement with the defendants to furnish them, upon a special agreement, indeed, but reasonable and beneficial in its terms. Viewing the contract in this light, or as an agreement for the services of the plaintiff for a limited time, to be repaid by the advancement and by retaining also two thirds of the fruits of his labor, it would, if fairly made and fully executed, be within the principles, if not within the direct authority of *Stone v. Dennison*, 13 Pick. 1.

In that case, the plaintiff, an infant over fourteen years of age, made an agreement with the defendant, his guardian assenting, by which he was to continue in the service of the defendant till he should arrive at the age of twenty-one, for his board, lodging, and education; and it was held, that the plaintiff not having been overreached in the contract, and the contract not being so unreasonable in itself as to raise a suspicion of fraud, and having been fully executed on both sides, the plaintiff could not maintain a *quantum meruit* for his services, by showing that in the event, as it happened, his services were worth more than the stipulated compensation. Indeed, to say that an infant could make no contract for his labor, however reasonable and beneficial to himself, by which he should be bound, even when fully executed on both sides, instead of serving as a protection to the infant, would have the effect only to prevent his being employed. Men of business want to know beforehand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed, and the price paid, there is an end of the matter.

7. Conditions Under Which Infant May Rescind. (Majority Rule.)

Johnson v. Northwestern Mutual Life Insurance Co. 56 Minn. 365.

Johnson, a minor, insured his life with the Insurance Company upon a participating basis. Immediately upon his coming of age, he gave notice that he wished to avoid the policy, and demanded a return of the money he had paid. He brings this action to recover that money.

Held, that according to the Minnesota rule an infant is not entitled to recover what he paid for a benefit unless he can return the consideration.

Mitchell, J.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities:

First. That, in so far as the contract is executory on the part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in *statu quo*, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief

where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot be restored. Can he recover back what he has paid? It is well settled in England that he cannot.

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that, although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule.

If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid, without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering the infant's estate, and which the other party knew, or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice.

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are as such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove

that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

8. Conditions Under Which Infant May Rescind. (Minority Rule.)

Simpson v. Prudential Insurance Co. 184 Mass. 348.

The plaintiff, Simpson, a minor, sues to recover the premiums paid by her on a life insurance policy issued to her by the defendant insurance company. There had been certain expenses to the defendant in keeping the policy in force, and the defendant contends that its expenses should be deducted against premiums.

Held, that an infant may rescind without returning the value of benefits received under an executed contract.

Morton, J.

The policy was what is termed a twenty-year endowment policy for \$500, and the agreed facts state that there was no fraud or undue influence practised upon the plaintiff by the defendant or its agents, and that the contract was a reasonable and prudent one for a person in the plaintiff's situation and condition in life. The premiums paid amounted to \$54 and it is agreed that the expense to the defendant of keeping the policy in force was \$28.72. The defendant contends that this should be deducted from or set off against the premiums if the plaintiff is allowed to recover for them.

It is manifest, we think, that however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or within the class of con-

tracts which have been held as matter of law to be beneficial to and therefore binding upon an infant. It is only when the contract comes within the class of contracts which as a matter of law are binding upon an infant that the question of its reasonableness and prudence is material.

The defendant contends that the contract having been executed in part at least the plaintiff cannot recover without making the defendant whole for the expense to which it has been subjected. But that would be compelling the plaintiff to carry out to that extent a contract which is not binding on her and which she may avoid.

It is well settled in this Commonwealth, whatever may be the law elsewhere, that in order to avoid a contract an infant is not obliged to put the other party *in statu quo*.

9. Ratification.

Boyden v. Boyden. 9 Metc. (Mass.) 519.

The defendants, both minors, gave a note to Boyden for a horse and plow, which they bought from him. They sold the horse and kept the plow after they came of age, but now seek to defend on the ground of infancy at the time of purchase.

Held, that by using property after an infant comes of age, he ratifies the contract under which the property was purchased.

Shaw, C. J.

If a minor gives a written promise for the purchase money for goods sold to him by an adult person, the contract is voidable and not void, and may be ratified by the infant, after coming of age. It is also well settled, that it is the privilege of the minor only to disaffirm the contract, and, until he does so, the other party is bound by it. The minor, when of age, may regard it as beneficial, and choose to affirm it. But if he elects to disaffirm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revert in the vendor. But until some notice given by the purchaser, after coming of age, of his purpose to annul the contract, or some significant act done, the vendor cannot reclaim his property, and his taking of it would be a trespass. If, therefore, the minor purchaser, after coming of age, retains the specific property, treating it as his own, when it is in a condition to be restored, and it is of any value, and if, for an unreasonable time, he neglects to restore it, or to tender it, or give notice of his readiness to restore it, according to the circumstances of the property and of the parties, it manifests his determination to keep the property and affirm the contract. And further; if, after coming of age, he retains the property for his own use, or sells or otherwise disposes of it, such detention, use or disposition—which

can be conscientiously done only on the assumption that the contract of a sale was a valid one, and by it the property became his own—is evidence of an intention to affirm the contract, from which a ratification may be inferred. In the present case, the defendants retained the plow, one of the articles for which the note was given, between two and three years after they both came of age.

10. Ratification by Lapse of Time.

Goodnow v. Empire Lumber Co. 31 Minn. 468.

Mrs. Hamilton, while still a minor, sold property to Huff, under whom the Lumber Company claims title. Mrs. Hamilton's children bring an action to avoid the conveyance, a number of years after her death, which occurred when she was twenty-five years of age. They contend that as their mother was a minor when she made the deed, they may avoid the conveyance.

Held, that a failure to disaffirm a conveyance of real estate within a reasonable time after coming of age constitutes ratification.

Gilfillan, C. J.

Must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred? Of the decided cases the majority are to the effect that he need not (where there are no circumstances other than lapse of time and silence), and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after minority ceases bars the right to disaffirm.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate), and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, "a dangerous weapon of offence, instead of a defense." For we cannot assent to the reason that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily. The exist-

ence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it; and the longer it may continue, the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without unnecessary delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. Three years and a half, the delay in this case (excluding the period of plaintiffs' minority), after the time within which to act had commenced to run, was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified.

11. Ratification: Knowledge of Right of Rescission Immaterial.

Morse v. Wheeler. 4 Allen (Mass.) 570.

Wheeler bought cattle from the plaintiff while he was an infant. After he came of age he promised to pay the balance due, but contends that he is not liable as he made this promise without knowledge that he was not bound.

Held, that if an infant subsequently ratifies a contract, the fact that he did not know he might repudiate it is immaterial.

Metcalf, J..

It is a long established legal principle, that he who makes a contract freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it. If, however, an exception to the application of that principle to a case like this has been authoritatively made, the defendant is entitled to the benefit of it. But we do not find that such an exception has ever been made by any judicial decision, unless it be in a case in Pennsylvania. The notion of such an exception had its origin in the opinion of Lord Alvanley as reported in an action for goods sold and delivered, to which there was a plea of infancy, and a replication of a promise after full age. The evidence was, that the defendant, after he attained full age, on payment being demanded of him, and on being

threatened with an arrest, promised to give his note for the goods, but afterwards refused to give it. Lord Alvanley said that the defendant "might bind himself by a new promise after he obtained full age, but that he held that such promise must be voluntary, and given with knowledge that he then stood discharged by law; that where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold that he was not bound to it. If therefore the jury should be of opinion that the facts were that this promise was so obtained, he should direct them to find for the defendant." But, as no evidence was given, nor question made, concerning the defendant's knowledge of his rights, it is manifest that the only adjudged point in the case was, that his promise was made under duress—threats of unlawful imprisonment—and that he might avoid it for that reason.

Even if it had been adjudged that knowledge of an infant's rights was necessary to the ratification of his contracts after he comes of age, such judgment would have been virtually overruled by the numerous cases decided since, in which the requisites of a ratification have been judicially stated without mention of such knowledge. And if such knowledge be necessary to the ratification of an infant's contract, by a new promise after coming of age, why is it not necessary in those cases of ratification, not by promise, but by acts done or omitted? We see no difference in principle between the cases.

12. Mere Acknowledgment Not Ratification.

Hale v. Gerrish. 8 N. H. 374.

Gerrish owed Hale money for goods bought in Hale's store while Gerrish was an infant. After Gerrish came of age, Hale asked him to sign a note for the amount. Gerrish acknowledged he owed the debt.

Held, that a mere acknowledgment is not sufficient ratification.

Upham, J.

The plaintiff asked the defendant "if he did not owe the debt?" The defendant replied "that he did, and that the plaintiff would get his pay"; and added, "I suppose this is all you want." He further said, that he had made arrangements to pay all his small debts before he went to New York.

The rule in this case is different from that where the statute of limitations is pleaded. An acknowledgment of a subsisting debt, where a claim has been barred by the statute of limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification, after he comes of age. This ratification must either

be a direct promise, as by saying, "I ratify and confirm," or "I agree to pay the debt," or by positive acts of the infant after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification, as an express and unequivocal promise.

In [Ford v. Phillips] 1 Pick. 202, the declaration of the defendant after he had become of age, was "that he owed the plaintiff, but was unable to pay him; he would endeavor, however, to get his brother to be bound with him." It was holden that this did not amount to a renewal of the promise. The declaration, in this case, that the defendant "owed the debt, and that the plaintiff would get his pay," seems to go no further.

13. Statutory Requirement of Written Ratification.

Lamkin & Foster v. LeDoux. 101 Me. 581.

Lamkin & Foster sold boots and shoes to LeDoux, a minor, who, as a retail trader, sold part of the merchandise before he came of age. The rest he continued to sell for some time after coming of age. Lamkin & Foster bring an action to secure payment for the goods.

Held, that under the Maine statute ratification must be in writing.

Emery, J..

Unfortunately for the plaintiffs the promise or contract to pay was made by the defendant while a minor. Even at common law a minor's contract was not enforceable unless ratified by him after coming of age. Our statute goes further and makes such contract unenforceable by action unless it is ratified in writing by the maker after coming of age. The defendant's conduct after coming of age may have shown a sufficient ratification at common law, but there was no ratification in writing, and hence the statute bars the action. If there be any doubt that such is the effect of the statute upon this action, we think it removable by a little study of the language of the statute which is as follows: "No action shall be maintained on any contract made by a minor unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessities, or real estate of which he has received the title and retains the benefit." The prohibition is absolute. The statute does not impose any conditions to be complied with before the defendant can have the shelter of the statute. It does not require him, before or afterward, to return the consideration as a condition.

The only two exceptions named in the statute also show its application to this case. The statute provides that it shall not apply to a contract made by a minor (1) for necessities, or (2) for

"real estate of which he has received the title and retains the benefit." It seems a necessary inference that the statute does apply to a contract made for other kinds of property (not necessities nor real estate) "of which he has received the title and retains the benefit." The rule is stated and the exceptions are stated. The contract in this case is not within the exceptions. It is therefore within the rule of the statute.

14. Appointment of Agent by Infant.

Coursolle v. Weyerhauser, 69 Minn. 328.

Coursolle, a minor who owned land, executed a power of attorney to Dorr to sell it. Dorr sold the property to Brown, under whom the defendants claim. After coming of age, Coursolle agreed to stand by the transaction and ratified it so far as he was able. He now seeks to disaffirm the deed on the ground that his appointment of an agent to sell land was void.

Held, that an infant's appointment of an agent to convey land is voidable, not void, and that ratification affirms the contract.

Mitchell, J.

The rule is that the act to be ratified must be voidable merely, and not absolutely void; and the question [is] whether the act of a minor in appointing an agent or attorney is wholly void, or merely voidable. Formerly the acts and contracts of infants were held either void, or merely voidable, depending on whether they were necessarily prejudicial to their interests, or were or might be beneficial to them. This threw upon the courts the burden of deciding in each particular case whether the act in question was necessarily prejudicial to the infant. Latterly the courts have refused to take this responsibility, on the ground that, if the infant wished to determine the question for himself on arriving at his majority, he should be allowed to do so, and that he is sufficiently protected by his right of avoidance. Hence the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void. This exception does not seem to be founded on any sound principle, and all the text-writers and courts who have discussed the subject have, so far as we can discover, conceded such to be the fact.

On principle, we think the power of attorney of an infant, and the acts and contracts made under it, should stand on the same footing as any other act or contract, and should be considered voidable in the same manner as his personal acts and contracts are considered voidable. If the conveyance of land by an infant personally, who

is of imperfect capacity, is only voidable, as is the law, it is difficult to see why his conveyance made through an attorney of perfect capacity should be held absolutely void. It is a noticeable fact that nearly all the old cases cited in support of this exception to the general rule are cases of technical warrants of attorney to appear in court and confess judgment. In these cases the courts hold that they would always set aside the judgment at the instance of the infant, but we do not find that any of them go as far as to hold that the judgment is good for no purpose and at no time.

The courts have from time to time made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court.

Hence, notwithstanding numerous general statements in the books to the contrary, we feel at liberty to hold, in accordance with what we deem sound principle, that the power of attorney from plaintiff to Dorr, and the deed to Brown under that power, were not absolutely void because of plaintiff's infancy, but merely voidable, and that they were ratified by him after attaining his majority.

15. Infant's Liability for Tort Distinguished.

Slayton v. Barry. 175 Mass. 513.

Barry fraudulently represented to the plaintiff, Slayton, that he was of age, and thereby secured the delivery of goods. Slayton now sues him in tort, as he cannot prevail in an action of contract on account of Barry's minority.

Held, that an action for tort against an infant cannot be maintained if the wrong arises out of contractual liability.

Morton, J.

The general rule is, of course, that infants are liable for their torts. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts but of protection from their contracts. The true rule seems to us to be, if the fraud is directly connected with the contract and is the means of effecting it, and parcel of the same transaction, then the infant will not be liable in tort. The fraudulent act, to charge him (the infant) must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action. In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without

showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question.

B. Contracts of Insane Persons.

1. What Constitutes Inability to Contract.

Meigs v. Dexter. 172 Mass. 217.

Dexter claims title to property under a deed from Hall. The question arises whether or not the deed to him is valid, there being doubt as to the sanity of Hall.

Held, that in order to avoid a contract, the insanity must be the direct cause of the making of the contract.

Knowlton, J.

[The court cited with approval the charge of the judge in the lower court, which was in part as follows:]

A person may have an insane delusion, I think, on one subject, as on the subject of religion, of politics even,—to make it a little more practical,—and yet not be insane on other subjects, and have good mental capacity to do business. The question is whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for the delusion, and which renders a person of unsound mind in respect to that thing. As I say, people may have notions on religion and politics that others think are insane, delusive; but that does not make them so, and that does not render all their business acts void. I dare say you may know men you think are deluded on some subjects, and yet they may be good business men perhaps. If the act is not inspired, moved by that particular delusion, it does not affect their transactions, nor would it affect a deed.

2. Liability of Insane Persons for Necessaries.

Sceva v. True. 53 N. H. 627.

Sceva sues Fanny True, who is insane and confined in an insane asylum, for necessities furnished for her support. Sceva had for some time taken charge of the defendant's property, and had supported her in part from its proceeds.

Held, that an insane person is liable for necessities regardless of capacity to contract.

Ladd, J.

An insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessities furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact,—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessities furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question, the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff that he was to be paid. Again: the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And, upon this point, the relationship existing between the parties, the length of the time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support, and credited for the use and occupation of the land,—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support, are for the jury. If these services were rendered and this support furnished, with no ex-

pectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

3. Knowledge of Insanity by Other Party Immaterial.

Seaver v. Phelps. 11 Pick. (Mass.) 304.

Seaver seeks to recover the value of a promissory note pledged to Phelps, at a time when he, Seaver, was insane.

Held, that an insane person may avoid his contract regardless of the belief of the other party that he was sane.

Wilde, J.

The general doctrine that the contracts of idiots and insane persons are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of assenting to a contract, or of doing any other valid act. And although their contracts are not generally absolutely void, but only voidable, the law takes care effectually and fully to protect their interests.

We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and this being admitted, we think it cannot avail him as a legal defense to show that he was ignorant of the fact, and practised no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.

Now no one would, we apprehend, undertake to maintain that the plaintiff would have been bound, if he had been a minor when he pledged the note. It does not appear to have been pledged for necessities; and all contracts of infants are either void or voidable unless made for education or necessities suitable to their degree and condition. And even if the note had been pledged as security for the payment of necessities, it would not have been binding if the plaintiff had been an infant. For a pledge is in the nature of a penalty, and may be forfeited, and can be of no advantage to the infant, and therefore shall not bind him.

We are aware that insanity is sometimes hard to detect, and that persons dealing with the insane may be subjected to loss and difficulty; but so they may be by dealing with minors. The danger, however, cannot be great, and seems to furnish no sufficient cause for modifying the rules of law in relation to insane people, if we had any power and authority to do so; which we have not.

4. Necessity of Return of Consideration on Disaffirmance. (Majority Rule.)

McCarthy v. Bowling Green Storage & Van Co. 182 App. Div. (N. Y.) 18.

McCarthy bought goods at an auction conducted by the defendant. McCarthy, at that time, was of unsound mind, but had not been judicially declared insane. A committee appointed under the New York statute to conserve his estate seeks to avoid the purchase.

Held, that a contract made by an insane person with another party who has acted in good faith, cannot be rescinded unless the other party can be placed in *statu quo*.

Laughlin, J.

Where a person, pursuant to law, is duly adjudged insane or otherwise incompetent and a committee has been appointed, the world is chargeable with notice, and every contract thereafter made with him is absolutely void; but contracts made by an incompetent person before such an adjudication and appointment are voidable only, and at his election on recovering from the disability, or at the election of his committee or personal representatives or heirs, and on such election being made, an action either at law or in equity may be brought or defended for the restoration or retention of his property. It does not appear to have been authoritatively decided in this jurisdiction whether on electing to avoid such a voidable contract, the consideration received by the incompetent must be tendered back. Contracts of infants and incompetents are voidable for their protection, in the event that the contracts are not deemed to be beneficial to them. In both classes of cases the right to elect to avoid the contract is based on the incapacity to contract. It is well settled that the right of an infant to avoid or rescind contracts made during his minority does not depend on his ability to restore the consideration, or otherwise make restitution to the other party with whom he contracted, or whether such party can be placed in *statu quo*; but to the extent that he still has the consideration the other party becomes entitled thereto. It is said in support of that doctrine that the right to avoid or to rescind would be of but little value to the infant, if he were required to make full restitution, for that would afford him no protection in the event that, through lack of mental capacity, he had lost or squandered the consideration. The same reasons would apply to contracts made by incompetents; but in the one case the other party would ordinarily know whether he was dealing with an infant or an adult, whereas there might be no ground for the slightest suspicion of incompetency. It would seem that one contracting with an infant with knowledge, actual

or imputed by law of his infancy and contracting with an incompetent knowing him to be incompetent should be held to have risked rescission without restitution; but where one in good faith contracts with an incompetent, not so adjudged, without notice or knowledge of his disability, it may well be argued that the exercise of the right of rescission will not be permitted, where full restoration cannot be made for the reason that thereby an undue burden would be cast on honest traders, who would be helpless against such consequences, and that it would be more equitable to regard the loss caused by the affliction as the misfortune of the afflicted one. Although everyone is chargeable with constructive notice where there has been an adjudication of incompetency it is evident one might innocently without actual notice contract with such a person; but the risks of loss from such contracts would be slight for ordinarily the incompetent is restrained or attended. A distinction is, therefore, made between the avoidance or rescission of contracts made by infants and those made by incompetents. With respect to the latter the rule is that if the contract was fair and for the benefit of the incompetent and made in good faith and without notice of his incapacity and the other party cannot be placed in *statu quo*, these facts constitute an equitable defense to the avoidance or rescission, to be pleaded and proved as such.

5. a. **Necessity of Return of Consideration on Disaffirmance.**
(Minority Rule.)

b. **Ratification.**

Hovey v. Hobson. 53 Me. 451.

Neal, an insane person, conveyed lands to Crocker, through whom Hobson holds. After Neal died, Lydia Dennett, his sole heiress, conveyed the property to Hovey. Hovey seeks to avoid the deed to Crocker on the ground that Neal was insane.

Held, that ignorance of insanity of the grantor is no defense to a purchaser without notice.

Appleton, C. J.

The questions arise, (1) as to rights of an insane man when restored to sanity, or of his heirs to avoid, as against his immediate grantee, his deed executed and delivered when insane; and, (2) as to the rights of those deriving a title in good faith, without notice, and for a valid consideration from such grantee.

The deed of an insane man not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void. The right of avoiding a contract exists, notwithstanding the person

with whom the insane man contracted was not apprized of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception. So an infant may avoid his contract, though the person dealing with him supposed him of age; or even when he fraudulently and falsely represented himself of age. The deed of an insane man being voidable, he may ratify it after he becomes sane, or his heirs after his decease. An insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, without first restoring the consideration to the grantee, the deed not having since been ratified nor confirmed. In this case, the remark of Shaw, C. J., that if "the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must first restore the price, if paid, or surrender the contract for it, if unpaid," is limited and restricted by Thomas, J., "to the case of a grantor having in his possession the notes which were the consideration of the deed and restored to the full possession of his mind." In the deed or other contract of an insane man the consenting mind is wanting. "To say that an insane man," observes Thomas, J., "before he can avoid a voidable deed, must first put the grantee *in statu quo*, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming, when with restored intellect he shall seek its annulment." Lunatics and persons *non compos* are not bound by their contracts, though no fraud nor imposition has been practised on them.

As the deed of an insane man is voidable only, it follows that it is capable of subsequent ratification by the grantor if he be restored to reason, or by his heirs. The retention of the notes after such restoration and receiving payments on them, would be evidence of such ratification. In the analogous case of infancy, it seems that there may be an acquiescence by the grantor under such circumstances as would amount to an equitable estoppel. It was held that an infant's acquiescence in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not amount to a confirmation, unless continued for twenty years, yet in connection with other circumstances it may amount to a ratification. Whether, in the case before us, the deed of Stephen Neal has been affirmed by the reception, by those authorized, of the purchase money for the land, or the heir at law, after the death of her husband or the passage of the laws in relation to married women, is equitably estopped by her omission to act under circumstances

which required action on her part, are questions which at this time are not pressing for consideration.

It is insisted, even if the deed of Neal might have been avoided as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith, for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the idiotic will be materially diminished, if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title—and he does convey such title to all bona fide purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee.

C. Contracts of Married Women.

1. Common Law Disability.

Robinson v. Reynolds. 1 Aikens (Vt.) 174.

Robinson brings a common law action against Mrs. Reynolds on a debt. The defense is that as she was a married woman at the time she incurred the debt, she was incapable of contracting.

Held, that at common law a married woman cannot contract.

Skinner, C. J.

In contemplation of law, by marriage, the existence of the wife is merged in that of the husband. And it is a general principle, that she can, during coverture, make no contracts by which she is bound; or sue or be sued alone.

To this rule of law, that a married woman is incapable of suing, or being sued, without her husband, there are excepted cases; and so far as the principles, which have controlled the decisions in such cases extend, the Court feel bound to recognize them, as the law here.

Where the husband is accounted in law *civiliter mortuus*, the wife may sue or be sued alone; as where the husband is exiled, banished for life, or has abjured the realm. So too, where the husband is an alien, having never resided in the government, she is capable of suing or being sued alone. But we believe there is no principle of law, that will authorize her to sue, or subject her to a suit, as a *feme sole*, where the husband is a citizen or subject of the government, on account of her having a separate maintenance, or of his temporary absence.

In examining the cases that have been decided, bearing upon the question upon which a decision is called for in this case, it will be found, that although there are some, in which a temporary absence of a citizen or subject, would seem to have been a ground for considering the wife as a *feme sole*, for the purposes of contracting, pleading, and being impleaded; yet it is clearly opposed by the current of authority.

If the wife was not liable at the time of contracting, lapse of time cannot make her so. Suppose the husband should return while the action was pending, could the plaintiff proceed with his action and imprison the wife? In the event of the return of the husband, it will hardly be contended that property acquired by the wife in his absence, would be beyond his control, or that she can be endowed. It is not perceived upon what principle the wife for some purposes may be considered as *feme sole*, and for others as *covert*.

2. Contracts Between Husband and Wife.

Lord v. Parker. 3 Allen (Mass.) 127.

Suit is brought by Parker on a note of J. H. Lord & Company, a firm of which two partners were Lord and Mrs. Lord. Mrs. Lord contends that she could not legally enter into a contract of partnership with her husband.

Held, that husband and wife cannot contract with each other.

Hoar, J.

The question is, whether it is in the power of a married woman, under the laws of Massachusetts, to form a copartnership with her husband and other persons, with all the consequences and liabilities incident to that relation? If she has this power, it is because it has been expressly conferred by statute. The Statute of 1855 provides that "any woman hereafter married may, while married, bargain, sell and convey her real and personal property, and enter into any contract in reference to the same, in the same manner as if she were sole."

The Statute of 1857 provides that "any married woman may, while married, bargain, sell and convey her real and personal property, which may now be her sole and separate property, or which may hereafter come to her by descent, devise, bequest or gift of

any person except her husband, and enter into any contract in reference to the same, in the same manner as if she were sole."

The title of these acts is, "An Act," and "An act in addition to an act to protect the property of married women." Their leading object is to enable married women to acquire, possess and manage property, without the intervention of a trustee, free from the interference of control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her "sole and separate" property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. The property which a married woman may acquire and dispose of by Statute 1857 includes such as may come to her "by gift of any person except her husband," clearly indicating that a gift from him was not to be recognized as creating any title to property in her.

V.

REALITY OF CONSENT.

There must be a real meeting of the minds of the parties to a contract. This implies an actual consent on both sides in order that there shall be an enforceable obligation. Mistake, misrepresentation, fraud, duress, and undue influence may constitute grounds for avoiding a contract.

Mistake occurs when the parties do not mean the same thing or when one or both form untrue conceptions as to the subject matter of the agreement. Mistake on the part of one party will not ordinarily avoid a contract, for the reason that a man is to be held to that which his acts indicate to be his intention, rather than to a secret purpose in no way evidenced. The gist of a mistake which will serve as basis for rescission lies in a failure of the minds to meet. If the minds have really met, it is not necessary that either of the parties should get what he thinks he is getting. A mistake as to the nature of the transaction, a mistake as to the identity of the person with whom the contract is made when that

identity is material, and a mistake as to the subject matter of the contract, represent the only cases in which a mistake will be ground for avoiding a contract. Mistake as to the subject matter for this purpose is to be limited to mistake as to the existence or identity of the subject matter and mistake as to the nature of the promise, which mistake is known to the other party. A mistake of law will not justify annulment, unless it is a mistake in regard to specific rights rather than to the operation of law in general. The law of a foreign state, by which is meant a state other than the forum, is for this purpose considered a matter of fact, not of law.

An innocent misrepresentation will not serve as basis for avoidance at law unless the misrepresentation is itself incorporated as a condition of the contract. In equity, and in jurisdictions where an equitable defense may be interposed at law, relief will be given when the contract is induced by an innocent misrepresentation intended by the parties to be a vital term of the contract. It then ceases to be a mere representation and becomes either an inducement going to the root of the contract and as such justifying the other party in repudiation, or a warranty, an independent, collateral and subsidiary promise which if untrue entitles the other party by the better rule at common law to damages but not to repudiation. Whenever there is a special relationship of confidence between the parties, as between trustee and beneficiary, principal and agent, guardian and ward, attorney and client, or partners, and whenever one party expressly or by necessary implication of circumstances relies upon the other for accurate statements to the knowledge of that other, as in the case of insurance, an innocent misrepresentation by the party in whom confidence or upon whom reliance is placed will justify the other party in repudiating the contract even at law.

Fraud, which always justifies the repudiation of a contract, has the same elements as an action of tort for deceit. It involves:

1. A misrepresentation of a material existing fact, which includes concealment when there is a duty of disclosure.
2. Knowledge of the falsity of the representation by the party making it, which includes a reckless disregard of truth or falsity.
3. An intent that the representation shall be acted upon by the other party.
4. Action in reliance upon the representation, and
5. Damage, which in the case of a contract induced by fraud is to be inferred from its execution.

Duress and undue influence operate to make impossible a real consent to the contract. Duress is threatened violence or impris-

onment by which a person is forced to enter into a contract against his will. It must be inflicted on the contracting party or on a near relative. It must induce the party to enter into the contract and it must prevent the exercise of the free will of the party so induced. Under modern law, detention of goods may constitute duress sufficient to make a contract voidable. Undue influence is a species of fraud, an abuse of confidence by one in a trust relationship or in authority, by taking advantage of another's weakness of mind, or by taking an oppressive and unfair advantage of another's necessity and distress. It must be more than ordinary persuasion, and must amount to a dominion over the will of the person so influenced to an extent that destroys his free agency.

A. Mistake.

1. No Mistake When Minds Meet.

Woburn National Bank v. Woods. 77 N. H. 172.

The bank, a creditor of William Woods, seeks to set aside a sale of land made by him to his mother, as a transfer in fraud of creditors. Woods needed money, and gave a deed of this land to his mother for \$1000, which he in good faith considered to be the purchase price for the land, but which his mother considered to be a loan.

Held, that there was no mistake which would justify setting aside the conveyance.

Peaslee, J.

A contract involves what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter in hand. The standard by which their conduct is judged and their rights are limited is not internal, but external. In the absence of fraud or incapacity, the question is: what did the party say and do? The making of a contract does not depend upon the state of the parties' minds; it depends on their overt acts. We are to fix the person with such expressed consequences as are the reasonable result of his volition.

Where a concurring intent is proved, it is merely a short way of showing that by conduct mutually intelligible the parties have expressed themselves each to the other. But when the intent does not concur, it is immaterial. Recourse must then be had to the external facts from which intent is usually judged. It must be shown by the words and acts of the parties. Cases where there is an estoppel form a large part of all that arise. The statement or offer of one party, acted upon by the other, is the typical case of making a contract.

Evidence of intent may be competent in certain cases as proof of what was in fact the overt conduct of the party. If it is possible to reproduce conversation exactly, yet the manner may often be as important. It may be incapable of reproduction, and some light may be thrown upon it by showing the intent with which the words were spoken. But after this evidence is admitted the final question to be decided is not what the secret intent was, but what intent was expressed by the overt conduct, taken as a whole.

It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages. The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. It is not the secret purpose, but the expressed intention, which must govern in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was his real intention.

The facts found show that there was a contract between these parties. The vendor proposed to sell at a price named, executed a deed, and delivered it to the vendee's representative. This representative in turn explained the transaction to the purchaser, who expressed satisfaction therewith, paid the purchase price, and had the deed recorded. The words and acts of the parties are susceptible of but one construction. They show a complete agreement and a full execution of the contract. The effect of this is not destroyed by proof that one party misunderstood the legal effect of what they said and did.

The finding that the minds of the parties did not meet is explained by other findings accompanying it. The meaning is that there was a unilateral mistake as to the effect of the contract which had been made. If this could ever be a ground for affording relief from the agreement entered into, it would be only at the instance of the mistaken party. Such a situation would not make the contract a nullity. At most, the contract could only be treated as voidable, and that at the option of the party who acted upon an erroneous belief. Until that party saw fit to take action, the contract would stand like any other where the element of mistake did not exist. If in the present case the defendant Adeline could avoid the contract, she has not sought to do so. On the contrary, after she was informed of her error she elected to stand on the contract as made. This election was not the inception of her title. It did not make the contract.

The contract existed from the time she first expressed her assent to it. If it was liable to be avoided by her, it was in force until so avoided.

2. Failure of Minds to Meet.

Kyle v. Kavanagh. 103 Mass. 356.

Kyle agreed in writing to sell Kavanagh certain property "in Waltham" on Prospect Street. Kavanagh supposed he was buying land situated on another Prospect Street in the same city. Kyle sues on the contract.

Held, that when the minds of the parties do not meet, there is no contract.

[The judge, at the commencement of his charge, instructed the jury that, "if the defendant was negotiating for one thing and the plaintiff was selling another thing, and if their minds did not agree as to the subject matter of the sale, they could not be said to have agreed and to have made a contract"; and furthermore, after the conclusion of his charge and at the request of the defendant, also instructed the jury that, "if the plaintiff or the defendant were in fact mistaken as to the location of the land, it was a good defense, although there was no fraud or misrepresentation on the part of the plaintiff," and that "mistake alone, if proved, was a good defense."]

Morton, J.

The instructions given were, in substance, that, if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This ruling is in accordance with the elementary principles of the law of contracts, and was correct.

3. Effect of Unilateral Mistake.

Wheaton Building and Lumber Co. v. City of Boston. 204 Mass. 218.

The Lumber Company sues the city of Boston to recover a check which it had deposited to guarantee acceptance in case it should be awarded a contract upon which it had bid. The bid was accepted, and then the company found that it had made an honest but unjustified mistake as to the interpretation of the specifications. It contends that the contract may be avoided on account of the mistake.

Held, that a misconception as to the consequences of language is not ground for rescission.

Rugg, J.

The specifications were not capable of reasonable misconstruction. The allowance plainly covered only certain interior steel work, and did not include structural steel for roofs, stairs, ceilings or metal lathing, which were to be constructed by the Roebling Company and did not include "any other work than interior floor and column construction." It is not open to argument that as matter of plain construction of language these important and extensive elements of steel construction were outside of the allowance and must be so considered by bidders. It is only when the phrase of the contract has no obvious meaning, or is reasonably capable of diverse interpretation and was in fact differently understood by the parties, that there is no agreement. There was here no mistake of fact, but simply a misconception on the part of the plaintiff of the consequences of the language used in making the proposal. Against such a mistake of law the courts afford no remedy. *Ignorantia legis neminem excusat*. The erroneous interpretation of the language of the specifications was not induced by anything said or done by any agent of the defendant. This is the typical case of misunderstanding the legal effect of language used in an instrument freely signed.

4. Mistake as to Nature of Transaction.

Rupley v. Daggett. 74 Ill. 351.

Daggett offered to sell a horse to Rupley for \$65 supposing he had said, "\$165." Rupley asked if he understood "\$65" correctly. Daggett replied in the affirmative, supposing that the amount over \$100 was in question, not the entire amount. Rupley took the horse, and Daggett sues to recover it on the ground that there was no contract.

Held, that there is no contract in case of mistake of both parties as to the nature of the contract.

Scott, J.

It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural jus-

tice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

5. Mistake as to Identity of Person.

Smith v. Wheatcroft. L. R. 9 Ch. D. (Eng.) 223.

Wheatcroft agreed in writing to sell certain land to Smith, understanding that he was the real principal, whereas in fact Smith was acting for others. In a suit by Smith and those others for specific performance, Wheatcroft defends on the ground of mistake as to the identity of the person with whom he was dealing.

Held, that, notwithstanding a mistake as to the identity of the person dealt with, if that identity is immaterial, the contract will be enforceable.

Fry, J.

"Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." I ask myself here whether the defendant has shown that any personal considerations entered into this contract? Has he shown me that he would have been unwilling to enter into a contract in the same terms with anybody else? I say distinctly that he has failed to produce such an effect on my mind, and that being so, I give judgment for specific performance.

6. Mistake as to Identity of Person.

Edmunds v. Merchants' Despatch Transportation Co. 135 Mass. 283.

A swindler representing himself to be Pape of Dayton, Ohio, bought goods from the plaintiffs in the name of Pape, and had

them shipped to Dayton. At that place they were delivered to him by the defendant carrier. The plaintiffs sue the defendant for delivering the goods to the swindler, claiming that the title to the goods was still in them.

In another case tried with this case, the swindler, instead of representing himself to be Pape, represented himself to be the brother of Pape, acting as his agent.

Held, that mistake as to the identity of the person will not avoid a contract unless that mistake brings it about that there is no sale to such person.

Morton, C. J.

[In the first case] we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In the case before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton, had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence.

[In the second case] the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler; and the defendant cannot defend, as in the other case, upon the ground that it has delivered the goods to the real owner.

7. Mistake as to Existence of Subject Matter.

Duncan v. The New York Mutual Insurance Co. 138 N. Y. 88.

The Insurance Company insured a vessel belonging to the assignor of the plaintiff for one year from August 3, 1888, under a contract allowing cancellation of the policy on arrival of the ship at port. The parties agreed in November to cancel the contract as of December 3, 1888, and the unearned part of the premium was returned. Neither party knew that the vessel had been lost in the meantime. Duncan sues for the amount of the policy.

Held, that a mistake of fact as to the existence of the subject matter is ground for rescission.

Earl, J.

The plaintiff in his complaint alleged all the facts and prayed for relief that the cancellation of the policy should be rescinded and set aside and that he should recover \$5,000, less the sum of \$233.33 returned to him for the unearned premium. The trial court found, what was absolutely true, that the cancellation was made by mistake. The insured could demand the return of unearned premium only upon the arrival of the steamship at her destination, and it was only upon her arrival that the defendant was bound to make the cancellation and return the premium. Both parties manifestly supposed on the 3rd day of December that the vessel had reached her destination. Both parties were mistaken as to that fact, and both were ignorant of the loss of the vessel prior to that time. So it is entirely clear that the cancellation was made under a mistake of fact. It was at least made under a mistake of fact by the plaintiff, and, therefore, upon the return of the money paid to him he was entitled, under familiar principles of law, to have the cancellation rescinded. Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; as to such facts the party must rely upon his own vigilance, and if not imposed upon or defrauded he will be held to his contract. Here the essential facts in reference to which the parties were mistaken were not extrinsic but they were intrinsic and essential to the contract of cancellation and were involved therein. The parties were dealing with the policy which both supposed to be in force covering the risk insured on the 3d day of December, with premiums which both parties believed were unearned, in reference to a vessel which both parties believed to be in existence. As to all of these facts they were mistaken. The vessel was lost. The policy had matured, and all the premiums had been earned.

8. Mistake as to Identity of Subject Matter.

Kennedy v. Panama, etc. Royal Mail Co. L. R. 2 Q. B. Cas. (Eng.) 580.

Lord Kennedy subscribed to stock in the Mail Company, relying upon a statement by officials of the company that they had a government contract for the carriage of mail to New Zealand. This statement they then believed to be true, although it was subsequently determined that the fact was otherwise. Lord Kennedy seeks to set aside his subscription on the ground of mistake.

Held, that this was not such a mistake in identity of the subject matter as to be ground for avoiding the contract.

Blackburn, J.

It was contended that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented, and not merely to represent that the company bona fide believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. And, if the invalidity of the contract really made the shares he obtained different things in substance from those which he applied for, this would, we think, be good law. The case would then resemble [cases] where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of the decision being that the thing handed over was not the thing paid for. There is, however, a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it

was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract.

The principle is well illustrated in the civil law. There,—after laying down the general rule, that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended each other as to the *corpus*, as where an absent slave was sold and the buyer thought he was buying Pamphilus and the vendor thought he was selling Stichus; and pronouncing the judgment that in such a case there was no bargain because there was "*error in corpore*," the answers given are to the effect, that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.

In the present case the prospectus states that the issue of the new shares was authorized by a meeting. Had that been a mistake, we think it would have been in the substance, as the applicant would not have had shares at all; but that statement was quite accurate, and he got shares in the company. It was stated in the prospectus that the motive for the increase of the capital was to enable the company to work the new contract. That also was strictly accurate. It was, by implication, stated that the contract was binding, and this was a misstatement, though an innocent one; but we do not think that it affected the substance of the matter, for the applicant actually got shares in the very company for shares in which he had applied; and that company has, by means of the invalid contract, got the benefit, and is now carrying the mails on terms, not the same as those they supposed, and perhaps not so profitable, but still on profitable terms. We think there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, but not preventing the shares from being in substance those he applied for.

These would not be legitimate considerations if there had been fraud in those acting for the company; doubtless, in such a case the company must bear all the consequences of the fraud of those they employ. But if the question be, as we think it is, whether the mis-

apprehension as to the contract goes to the root and substance of the matter, so as to make the shares which the applicant has obtained in a company with this questionable contract substantially different things from shares in a company with a valid contract, we think those considerations are legitimate; and they lead us to the conclusion that the case is analogous to that of the horse supposed to be sound and not really so, and not to the case of a thing substantially different.

9. Mistake as to Nature of Promise Known to Other Party.

The Town of Essex v. Day. 52 Conn. 483.

The town of Essex issued twenty year bonds, intending that they should be payable at the option of the town at the end of ten years. By mistake, they were issued without that provision. This suit is brought to correct bonds in the hands of Day, who had purchased them with full knowledge of the facts.

Held, that a contract may be corrected in case of a mistake in the nature of the promise which is known to the other party.

Loomis, J.

Was the mistake one of such a character that it can be corrected by a court of equity?

It is claimed by the counsel for the defendant that the mistake, in such a case, must be mutual, and the cause of the agreement; and numerous authorities are cited in support of the proposition.

This rule, within the limits of its proper application, is founded in reason. If a contract is corrected by a court of chancery to make it conform to the intention of one of the parties, it is of course forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party. But this case is not of that character nor governed by that rule. A grantor by mistake embraces in his deed a parcel of land that neither party intended to have conveyed. The grantee sees his mistake, but does not call the attention of the grantor to it, and afterwards claims the parcel thus accidentally conveyed. Or a person offers a reward of \$100 for the detection and arrest of a burglar, but by mistake and without his notice it is printed \$1,000. A man who knows of the mistake arrests the burglar and claims the \$1,000. In each of these cases the error is not mutual, but wholly on the one side. What is there on the other? Not mistake, but fraud. That fraud can never stand for a moment in a court of equity. But suppose the case to be one where, instead of actual fraud, there is merely such knowledge, actual or imputed by the law, as makes it inequitable for the purchaser to retain his advantage. The court will deal as summarily with that inequitable position of the party, as in the other case with his fraud.

"The mistake of one party only is attended by different consequences, according as the other party is or is not cognizant of the mistake. An agreement cannot be affected by the mistake of either party in expressing his intention, of which the other party has no knowledge. A man cannot have relief on the ground of mistake, unless the party benefited by the mistake is disentitled in equity and conscience from retaining the advantage which he has acquired."

10. Mistake as to Value of Subject Matter.

Wood v. Boynton. 64 Wis. 265.

The plaintiff brought a stone to the defendants, partners in the jewelry business, and upon their offer to buy it for a dollar, sold it to them for that price. It was an uncut diamond, but neither party knew that fact. The plaintiff now seeks to rescind the sale on the ground of mistake.

Held, that a mistake as to the value of the subject matter will not warrant rescission of a contract.

Taylor, J.

The only question in the case is whether there was anything in the sale which entitled the vendor to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot

repudiate the sale because it is afterwards ascertained that she made a bad bargain.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been told so, still she knew it was not a diamond.

II. Mistake of Law.

Reggio v. Warren. 207 Mass. 525.

Reggio seeks to set aside a release of his right to certain payments under a will. The release was given upon an agreement by the trustees to pay a promissory note which they made to Reggio, but which, it subsequently developed, they had no power to make, they and he assuming at the time that such a transaction was proper.

Held, that when a person enters into a transaction through a mistake as to his own antecedent rights, he may obtain rescission.

Sheldon, J.

It is a general doctrine that, as it is the duty of every one to conform his conduct to the requirements of the law, so all men must be treated alike in courts of civil and criminal jurisdiction, as being aware of the duties and obligations which are imposed upon them by the law, and that ordinarily one cannot successfully ask for affirmative relief or defend himself against an otherwise well founded claim, on the bare ground that he was either ignorant of the law or mistaken as to what it prescribed.

But it is now well settled that this rule is not invariably to be applied. In some cases where great injustice would have been done by its enforcement, this has been avoided by declaring that a mistake as to the title to property or as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of a deed or as to the duties or obligations created by an agreement, was really a mistake of fact and not strictly one of law, and so did not constitute an insuperable bar to relief. In other cases,

a distinction between ignorance or mistake as to a general rule of law prescribing conduct and establishing rights and duties, and one as to the private right or interests of a party under a written instrument, has been laid down; and it has been declared that, while relief could not be given by reason of a mistake of the former kind, one of the latter kind shared by both parties to an agreement and resulting in a loss of the rights of one of them, may be set aside at the suit of the injured party, though no fraud was practised upon him. The distinction taken is between the general law of the country, for ignorance of which no one is excused, and private rights which depend upon the existence of particular facts and the rules which the law declares, as to those facts.

In other cases, sometimes as the ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving relief to one injured by reason of a mistake of law, but that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress. So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or of fact entertained by both parties.

The correct doctrine both upon principle and authority was stated by the Supreme Court of Michigan in *Renard v. Clink*, 91 Mich. 1, 3: "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have been mistaken or misconceived its legal meaning, scope, or effect. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

12. Mistake as to Law of Another Jurisdiction.

Harven v. Foster. 9 Pick. (Mass.) 111.

Craigie, a resident of Cambridge, Massachusetts, owned real

estate in New York. Upon his death, the property descended to his niece, the plaintiff, the daughter of his sister Elizabeth, and to his three nephews, one of whom was the defendant, sons of his sister Mary. All four effected a settlement under which each took one quarter of the proceeds, assuming that to be the proper division. However, under a New York statute, of which all parties were ignorant, the plaintiff was entitled to one half the proceeds, and she now sues to recover that share.

Held, that a mistake as to the law of another state is a mistake of fact.

Morton, J.

The misapprehension or ignorance of the parties to this suit related to a statute of the state of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. The laws of other states in the Union are in these respects foreign laws.

The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this state.

That the *lexi loci rei sitae* must govern the descent of real estate, is a principle of our law, with which everyone is presumed to be acquainted. But what the *lexi loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the state of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts?

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He therefore has in his hands money which he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands.

B. Misrepresentation and Fraud.

1. Innocent Misrepresentation in General.

Johnston v. Bent, 93 Ala. 161.

The plaintiff, Bent, sold organs to Grambs & Buchanan, upon Buchanan's representation that the firm had a certain excess of assets over liabilities, which Buchanan reasonably believed. Upon the firm becoming insolvent, Bent seeks to recover the goods, contending that the contract was voidable on account of the misrepresentation.

Held, that an innocent misrepresentation which does not amount to fraud will not justify rescission of the contract.

Clopton, J.

The authorities differ as to what conduct, misrepresentations or concealments constitute such a fraud as will effectively avoid a sale of goods on credit, so as to authorize the seller to reclaim them. Some hold that actual artifice, contrivance or false pretense, intended and operative to deceive, is essential; others, that when the vendee induces the owner of goods to sell them on credit by concealing a positive intention not to pay for them, this is a fraud which entitles the owner to disaffirm the contract, and recover the goods from the purchaser, though there may be no fraudulent misrepresentation, or actual artifice; and others, that the concealment from the seller of the buyer's insolvency, known to himself, and that he has no reasonable expectation of ability to pay for the goods, is not sufficient, but otherwise if there be actual deceit. As a general proposition, sustained by the preponderance of authority, where a party, being insolvent or financially embarrassed, induces the owner to sell him goods on credit, having an intent not to pay for them, by fraudulently concealing or misrepresenting his insolvency, he perpetrates a fraud which entitles the vendor to disaffirm the contract and recover the goods from him.

The case made by the record does not come within either of these kinds or classes of frauds. No contrivance, or device intended to deceive, was used, and there was no fraudulent misrepresentation or concealment. We have mentioned the various statements of the doctrine on this subject by the authorities for the purpose of showing that all of them rest on the fundamental principle, that the artifice, representation or concealment must be fraudulent in its nature and character, though the authorities differ as to what is sufficient. In order to justify a vendor in disaffirming a sale of goods as fraudulent, so as to authorize a recovery in detinue or trover against the purchaser, there must co-exist at the time of the purchase insolvency, or failing circumstances, a pre-conceived design not to pay

for the goods, or its equivalent (no reasonable expectation of being able to pay for them), and a fraudulent concealment of, or fraudulent representation in reference to, one or more of these facts. From this statement of the rule it is manifest that intentional fraud in the misrepresentation or concealment is requisite.

While an innocent misrepresentation of a material fact, inducing a contract, may be regarded in equity as constructive fraud, warranting its avoidance, this court has never declared that it constitutes what has been termed a legal fraud, sufficient, by the rules of the common law, to avoid the contract at law, so as to revest the property and authorize the seller to bring detinue for the recovery of the goods, or trover for their conversion. "As to the buyer's right to rescind a contract induced by false representation, the principles adopted and applied by the courts of equity had, before the judicial act, a much wider scope than those of the common law. At common law, except in the case of an innocent misrepresentation affecting the substance of the contract, the buyer's right to rescind was governed by the same considerations as would have entitled him to maintain an action of deceit; but it seems clear that, to obtain relief in equity, it was sufficient for the buyer to prove that the misrepresentation was a material one inducing the contract, and was false in fact. The rights of the buyer and seller, in this respect, are correlative. The right to rescind does not arise at law, unless the representation be false to the knowledge of the party making it, or, at least, made by him recklessly, without reasonable grounds for believing it true, or under circumstances showing that he was regardless of its truth or falsity, in which case it cannot be regarded as innocently made. A representation, though false, which the party making believes, in good faith and on reasonable grounds, to be true, furnishes no justification for avoiding a sale at law, as obtained by fraud, whatever other remedies may be available."

2. Misrepresentation of a Term of the Contract.

Behn v. Burness. 3 B. & S. (Eng.) 751.

Behn agreed to charter his ship, the *Montaban*, to Burness for carriage of coal to Hong Kong. In the charter party, it was stated that the ship was "now in the port of Amsterdam," at which port the ship did not in fact arrive until several days later. Burness refused to accept the ship when ready to load, and contends that the representation was a condition of the contract.

Held, that an innocent misrepresentation concerning an essential term of the contract, is ground for rescission of the contract.

Williams, J.

The question in this case is, whether the statement in the charter party that the ship is "now in the port of Amsterdam," is a "repre-

sentation" or a "warranty," using the latter word as synonymous with "condition"; in which sense it has been for many years understood with respect to policies of insurance and charter parties.

It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor, (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue.

If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority, that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable.

The representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement. But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded

as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.

The question on the present charter party is confined to the statement of a definite fact—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so: the evidence for the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition.

3. Misrepresentation a Ground of Relief in Equity.

Drake v. Fairmont Drain Tile & Brick Co. 129 Minn. 145.

Drake was induced to subscribe to stock of the Tile Company, by a representation that the land of the company contained clay peculiarly adapted to the manufacture of tiles. This representation was made by the officers of the company in the belief that it was true, but it was in fact false.

Held, that equity will grant relief against a misrepresentation innocently made.

Holt, J.

We must determine whether one who has been induced by the innocent, but material, misrepresentations of another to enter a contract with the latter is without remedy. When the one deceived asks for no more than to return what he got, and get back what he parted with in the deal, it would seem, at first blush, that courts of justice, whether of law or equity, should be more favorably inclined to him than to the one who admits that he caused the deception, but offers the excuse that, when he was guilty thereof, he believed in good faith that he represented the facts truly. The

real injury to the one deceived is not lessened in the slightest by the knowledge, motives or state of mind of the one who made the misrepresentations.

In an action in equity to rescind, the claim of a defendant that he made the false representations believing, in good faith, that they were true, is of no avail. To entitle a party to relief in equity by reason of fraudulent representations, it is not necessary that it be shown that the party making the false statements knew that they were false when he made them. They may have been innocently made, yet, if represented as positive statement of facts, as distinguished from mere opinions, and relied upon by the other party to his prejudice to the extent that he is led to act thereon, equity will afford relief. It can make no difference in this immediate connection whether the representation as made was wittingly or unwittingly false and untrue. In such cases *scienter* is not of importance. Nearly all the cases upon which the petitioner relies are cases in equity of rescission or equitable estoppel in which bad faith is never indispensable as an element.

We think the question has been determined in this state by *Martin v. Hill*, 41 Minn. 337, an action to rescind the purchase of shares of stock because induced by false representations. Therein Chief Justice Gilfillan states: "That one who, making a purchase, does not get by it substantially what, from the false representations of the vendor as to material facts, he had a right to believe, and does believe he is purchasing, may have a rescission of the contract of purchase, if he is guilty of no laches, is beyond question. It would be the grossest injustice to hold a party to a purchase, where, solely through the fault of the other party, he gets only what he did not intend to buy. And to this right of rescission it is not essential that the false representations were made with actual intent to defraud. The right is not based upon actual fraud, but on a material mistake of facts caused by the fault of the other party." The false representation having been made, it becomes immaterial, from a legal view, whether the defendant made it innocently or corruptly, if the plaintiff, relying thereon, was in fact misled to his injury. In either case it works a fraud on plaintiff.

4. Misrepresentation by One in Confidential Relationship.

Butler v. Gleason. 214 Mass. 248.

Dr. Gleason, the plaintiff's physician, negligently injured her by causing a collision with the carriage he was driving. He procured a release from her upon his assurance that she would be restored to health. She now sues for the negligence, attempting to set aside the release.

Held, that when persons are in a confidential relationship, abuse of that relationship is to be inferred from misrepresentation.

Braley, J.

The defendant maintains that the representation was merely an encouraging statement not intended as anything more than the expression of a hopeful expectation, which does not constitute actionable deceit. But the relation of a physician to his patient is necessarily one of trust and confidence, and commercial transactions between them where fraud or undue influence is charged, are viewed by the courts with some jealousy, and are carefully scrutinized. If he solicits and procures a conveyance to himself of the property of his patient, whether by way of gift or of purchase, the burden, where the good faith of the transaction is attacked, rests upon him to show that the patient's confidence has not been abused, and that undue influence has not been exerted. It is not sufficient that the patient knew what he was doing, but the question is how the intention was produced.

5. Elements of Fraud.

Southern Development Co. v. Silva. 125 U. S. 247.

The Development Company bought a mine from Silva, on his representations of value and opinion as to ore content. The representations turned out to be false, and the company asserts the right to have the sale set aside.

Held, that such representations do not justify rescission of the contract on the ground of fraud.

Lamar, J.

The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof—

First. That the defendant has made a representation in regard to a material fact;

Secondly. That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage; and,

Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an expression of an opinion or judgment, honestly entertained; and, again, (excepting in peculiar cases,) it excludes statements by the owner and vendor of property in respect to its value.

Any statements that may have been made by Silva with reference to the value of the mine, cannot, under the circumstances of this case, be considered an act of fraud on his part sufficient to warrant a court of equity in setting aside the contract herein. Yerington testifies that Silva said he had been asking \$15,000 for the mine, but that he would take \$12,500; while Forman says he does not recollect that Silva made any statement as to the value of the mine, but that he heard Silva say he thought it was worth \$15,000. Such statements are not fraudulent in law, but are considered merely as trade talk, and mere matters of opinion, which is allowable.

6. Promissory Misrepresentation of Fact.

Dawe v. Morris. 149 Mass. 188.

Dawe was induced to enter into a contract to build thirty miles of the Florida Midland Railway, by false representations of Morris that he had already purchased a certain quantity of rails at a certain price, and would sell them to Dawe at that price if Morris would make the contract. Dawe sues for deceit, a tort action which requires the same elements of fraud that justify rescission of a contract.

Held, that there was no representation of a material existing fact.

Devens, J.

A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its character that one will thereafter sell goods at a particular price or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation, but a contract, for the violation of which a remedy is to be sought by action thereon. The statement by the defendant that he would thereafter sell rails at a particular price if the plaintiff would contract with the railway company was a promise, the breach of which has occasioned the injury to the plaintiff.

The plaintiff contends that, even if this is so, the representation that the defendant had thus purchased the rails at the price named was material and false; but if the allegation that the defendant had purchased the rails be separated from that of the promise to sell them to the plaintiff, it is seen at once to be quite unimportant

and immaterial. Had the defendant actually sold, or had he been ready to sell, the rails at the time and price he promised that he would, no action could have been maintained by reason of any false representation that he had purchased them when he made his promise, and no possible injury could thereby have resulted to the plaintiff.

In order that a false representation may form the foundation of an action of deceit, it must be as to some subject material to the contract itself. If it merely affects the probability that it will be kept, it is collateral to it.

7. Misrepresentation of Intention as Fact.

Edgington v. Fitzmaurice. L. R. 29 Ch. D. (Eng.) 459.

Edgington bought bonds of a company, relying upon a prospectus issued in its behalf by the defendants, which stated that the purpose of the issue was to develop the business. In fact, the issue was for the purpose of paying off existing obligations. This action is brought by Edgington for repayment of his money.

Held, that a statement of intention is a representation of fact.

Bowen, L. J.:

This is an action for deceit, in which the plaintiff complains that he was induced to take certain debentures by the misrepresentations of the defendants, and that he sustained damage thereby. The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. But it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it and has sustained damage by so doing: you must show that the statement was either the sole cause of the plaintiff's act, or materially contributed to his so acting.

The objects for which the money was to be raised were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his

digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

8. Misrepresentation by Concealment.

Stewart v. Wyoming Cattle Ranch Co. 128 U. S. 383.

The Ranche Company bought a herd of cattle from Stewart, who prevented the purchasing agent from making inquiries on his own account as to the truth of the Ranche Company's representation regarding the number of calves branded. These inquiries would have revealed the fact that many of the cattle had recently been lost. The Ranche Company sues in tort for deceit, instead of attempting to rescind the contract.

Held, that a misrepresentation may be made by concealment of a material fact, as well as by actual falsehood.

Gray, J.

It is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.

In an action by the buyer of tobacco against the sellers to recover possession of it, there was evidence that before the sale the buyer, upon being asked by Girault, one of the sellers, whether there was any news which was calculated to enhance its price or value, was silent, although he had received news, which the seller had not, of the Treaty of Ghent. The court below, "there being no

evidence that the plaintiff had asserted or suggested anything to the said Girault, calculated to impose upon him with respect to the said news, and to induce him to think or believe that it did not exist," directed a verdict for the plaintiff. Upon a bill of exceptions to that direction, this court, in an opinion delivered by Chief Justice Marshall, held that while it could not be laid down, as a matter of law, that the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruction of the judge was erroneous, and the question whether any imposition was practised by the vendee upon the vendor ought to have been submitted to the jury.

The instructions excepted to in the case at bar clearly affirmed the same rule. The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranch with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranch.

9. Knowledge of Falsity.

Litchfield v. Hutchinson. 117 Mass. 195.

Hutchinson, in selling a horse, falsely represented to Litchfield, the buyer, that it was sound, when in fact it was not sound. Litchfield sues for deceit.

Held, according to the Massachusetts rule, that a false statement as of one's own knowledge, of a fact susceptible of knowledge, is fraudulent.

Morton, J.

To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts

to be true. The falsity and fraud consist in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge.

If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge and a representation by the defendant made as of his own knowledge that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him.

10. Intention that Other Party Act.

Wells v. Cook. 16 Oh. St. 67.

Cook sold diseased sheep to Osmund Wells, representing them to be sound. Osmund, not knowing their condition, sold them to Orlando Wells, who made the original purchase for Osmund relying on the truth of Cook's representations, and who now sues Cook.

Held, that there was no intention that the plaintiff should act upon the representation.

Brinkerhoff, C. J.

If A fraudulently makes a representation which is false, and which he knows to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action on the case for deceit. We have been able to find no case which transcends the limit thus defined—no case which purports to hold, or is decided on the principle, that if A makes a false and fraudulent representation to B, meaning that C, and C alone, shall act upon it, and B thereupon assumes to act upon it, and suffers damage, B can maintain an action against A for the deceit. And as transactions of the kind last supposed must be of frequent occurrence in every commercial country, the fact that no such case can be found, is strong evidence that such a doctrine is unknown to the law. And the case last above supposed, is, really, the case before us. The representations complained of were not made to the plaintiff, meaning that the plaintiff should act upon them in any manner or matter affecting his own interests, but were made to the plaintiff, acting as the avowed agent of his brother, simply in a representative capacity, meaning that the brother should act upon them; and the fact that the brother was meant to act upon them, through the plaintiff, as his agent, cannot, it seems to us, alter the case in any legal aspect.

It was held, that a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it, so labelled, into market, is liable to all persons, who, without fault on their part, are injured by using it as such medicine in consequence of the

false label, and this, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured. In that case the article sold purported to be a medicine, was intended for retail in minute quantities, and to be administered in doses to a great number of persons. And the court regarded the accompanying label as a continuous representation to, and intended to be acted on by, whomsoever it might concern, that the article was what its label purported. In these particulars, and others, the case differs from that before us, and falls short of being conclusive of it, if the case be accepted as authority.

The influences of human conduct, good or bad, are far-reaching, and are often seen and felt in consequences exceedingly remote, but uncertain and complicated. It is simply impossible that municipal law should take cognizance of all these consequences. From necessity, a large share of them must be left to the jurisdiction of public opinion, individual conscience, and, finally, to the retributions of another world. There must, somewhere, be fixed a limit between the near and remote, direct and indirect consequences, beyond which the law will not take cognizance of them. And in this case we are satisfied that one of the prescribed limits is this—that the false and fraudulent representations must have been intended to be acted on, in a matter affecting himself, by the party who seeks redress for consequential injuries. If this limit is to be extended, it must be the work of the legislature.

II. Action by Other Party.

Mabardy v. McHugh. 202 Mass. 148.

The plaintiffs went upon land sold them by the defendant, who pointed out the true boundaries, but stated that the acreage was much larger than was actually the case. The plaintiffs affirmed the sale, but sue in tort for deceit.

Held, that a misrepresentation of acreage of property is not a misrepresentation of fact which justifies avoidance of the contract.

Rugg, J.

If the point were now presented for the first time, it is possible that we might be convinced by the argument of the plaintiffs and the great weight of persuasive authority in its support. But there is something to be said in support of two earlier decisions now questioned. A purchase and a sale of real estate is a transaction of importance, and cannot be treated as entered into lightly. People must use their own faculties for their protection and information, and cannot assume that the law will relieve them from the natural effects of their heedlessness, or take better care of their interests than they themselves do. Thrift, foresight and self-reliance would be undermined if it was the policy of the law to attempt to

afford relief for mere want of sagacity. It is an ancient and widely, if not universally, accepted principle of the law of deceit that, where representations are made respecting the subject as to which the complaining party has at hand reasonably available means for ascertaining the truth and the matter is open to inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other parties. This rule in its general statement applies to such a case as that before us. It is easy for one disappointed in the fruits of a trade to imagine, and perhaps persuade himself, that the cause of his loss is the deceit of the other party, rather than his own want of judgment.

It is highly desirable that laws for conduct in ordinary affairs, in themselves easy of comprehension and memory, when once established, should remain fast. The doctrine of *stare decisis* is as salutary as it is well recognized.

12. Damage.

Randall v. Hazelton. 12 Allen (Mass.) 412.

Randall owned property mortgaged to an insurance company, which, after the mortgage had become overdue, promised to notify Randall in ample time when it wanted payment. The defendants obtained an assignment of the mortgage by falsely representing to the insurance company that Randall so desired. They then foreclosed. Randall sues for their false representation to the company.

Held, that as the plaintiff was bound to pay the mortgage, he was not damaged.

Colt, J.

The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there an action lieth. Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. So in reference to the term damage, the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*.

There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled.

But a more important consideration in this connection is, that the damage which this doctrine contemplates must not only be caused by the fraud and misconduct of the defendant, but it must be the direct and immediate consequence of the wrongful act. The law looks to the proximate and not the remote cause of the injury. "It were infinite," says Lord Bacon, "to consider the causes of causes and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." This is the only practical rule which, in view of the complication which surrounds this doctrine of causation, can be adopted in the administration of justice by human tribunals. Where the fraud and damage sustain this intimate relation of proximate cause and effect, and not otherwise, they are said to concur in the sense of the proposition above stated.

Applying the doctrine thus explained to the plaintiff's case, we are of opinion that he sets forth no legal cause of action. The declaration shows no consideration for the alleged promise of the mortgagees to inform the plaintiff, in case the amount of the debt should be wanted by them. It was an agreement not legally binding upon them. There was nothing in it to prevent them in law from proceeding to do all the acts in relation to advertising and selling the property which were done by the defendants; nor did it prevent them from assigning the mortgage. It cannot be said to be an invasion of any legal right for the defendants to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking.

This specific act of obtaining the assignment in the manner stated in itself produced no direct and immediate damage to the plaintiff. The damage resulted solely from the foreclosure and forced sale of the premises, and would have been no more and no less if the mortgage had not been assigned, and the mortgagees had pursued pre-

cisely the course charged upon the defendants in regard to the sale. It was undoubtedly a necessary step in order that the defendants might practise the alleged oppression; but it was not the immediate cause of the injury. The substantial, efficient and immediate cause of the loss to the plaintiff was the foreclosure and sale. And we are not permitted to go behind and inquire into the antecedent causes, near or remote.

13. Effect of Fraud.

Rowley v. Bigelow. 12 Pick. (Mass.) 306.

Rowley sold corn to Martin, who fraudulently obtained it while he was insolvent without intending to pay for it. Martin sold and shipped the goods to the defendant, Bigelow. Rowley now seeks to set aside the sale.

Held, that the effect of a sale of goods procured by fraud is to vest a voidable title in the vendee, which becomes a valid title in an innocent purchaser for value from the fraudulent vendee.

Shaw, C. J.

This contract and delivery were sufficient in law to vest the property in Martin, and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods; or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud practised on him, might, in consequence of obtaining security by attachment or otherwise, prefer to affirm the sale. The consequence thereof is, that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none.

We take the rule to be well settled, that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee or any other person claiming under him and standing upon his title, but not against a bona fide purchaser without notice of the fraud.

The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud.

C. Duress and Undue Influence.

1. What Constitutes Duress.

Galusha v. Sherman. 105 Wis. 263.

Sherman bought tainted meat from Galusha and was poisoned. His attorney forced Galusha and his wife to mortgage their farm for \$1,000 in order to settle the claim of Sherman, by threatening to prosecute Galusha criminally. The attorney accompanied these threats with demonstrations of violence towards Galusha which put him, a man of somewhat weak character, in fear.

Held, that a contract entered into under duress is voidable.

Marshall, J.

Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which would overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself.

The theories advanced by appellants' counsel to support the claim that the finding as regards respondent suffering from wrongful deprivation of his will power at the time he made the papers in controversy is not warranted by the evidence are [now] unsound. Those theories are: (1) Oppression does not constitute duress unless sufficient to overcome the will of a person of ordinary courage; (2) a threat to arrest a person for an offense of which he is not guilty does not constitute duress; (3) a threat to arrest a person on a charge that does not constitute a criminal offense does not constitute duress. All of such theories have some support, but all are out of harmony with the real foundation principle of duress, which is that it is the condition of the mind of the wronged person at the time of the act sought to be avoided, not the means by which such condition was produced. Such theories are also out of harmony with

the theory upon which duress of a contracting party renders the contract voidable as to him, which is that the free meeting and blending of the minds of contracting parties are requisite to a binding contract.

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness.

That one should be led astray on the question of there being a legal standard of resisting power, by which the sufficiency of the oppressive conduct claimed to have produced duress in a given case must be tested, is most natural in view of the number and character of the authorities to that effect.

Sufficient has been said to show the conflict that exists on the subject under discussion. Under [the more advanced doctrine], advantages obtained by what was considered duress by old common-law rules,—or such rules as changed in respect to the standard of resisting power which the threatened person is legally bound to exercise for his own protection or be remediless at law for the consequences, and in respect to the nature of the threats deemed legally sufficient to overcome a person of the legal standard of resisting power,—and also advantages wrongfully obtained,—though not by duress in law and remediable as such, but remediable in equity upon the ground of unjust compulsion,—are now practically in one class. Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible, whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress

is wholly a matter of law and is simply the deprivation by one person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law.

From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by an arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him.

2. Threat of Lawful Act.

Silsbee v. Webber. 171 Mass. 378.

Webber accused Mrs. Silsbee's son of stealing money from him, and forced the son to confess and to promise security for \$1500. His mother, the plaintiff, met Webber, who threatened to tell her husband the facts if she did not assign to him her share in her father's estate to secure the son's debt. She did this for the reason that her husband was then on the verge of insanity and she feared that knowledge of the situation would drive him insane. She now seeks to recover the money paid to Webber.

Held, that duress may consist of threats of a lawful act.

Holmes, J.

The strongest objection to holding the defendant's alleged action illegal duress is, that, if he had done what he threatened, it would not have been an actionable wrong. In general, duress going to motives consists in the threat of illegal acts. Ordinarily, what you may do without liability, you may threaten to do without liability. But this is not a question of liability for threats as a cause of action,

and we may leave undecided the question whether, apart from special justification, deliberately and with foresight of the consequences, to tell a man what you believe will drive him mad is actionable if it has the expected effect. If it should be held not to be, contrary to the intimations in the cases cited, it would be only on the ground that a different rule was unsafe in the practical administration of justice. If the law were an ideally perfect instrument, it would give damages for such a case as readily as for a battery. When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat. In the case of the threat there are no difficulties of proof, and the relation of cause and effect is as easily shown as when the threat is of an assault. If a contract is extorted by brutal and wicked means, and a means which owes its immunity, if it have immunity, solely to the law's distrust of its own powers of investigation, in our opinion the contract may be avoided by the party to whom the undue influence has been applied. Some of the cases go further, and allow to be avoided contracts obtained by the threat of unquestionably lawful acts.

3. Threat of Lawful Imprisonment.

Morse v. Woodworth. 155 Mass. 233.

Morse sues to recover certain notes given by him to Woodworth. Morse, a bookkeeper for Woodworth, was short in his accounts, and gave the notes in suit to Woodworth in order to avoid prosecution. He now attempts to avoid this transaction on the ground of duress.

Held, that a threat of arrest and imprisonment for an offense of which a party is guilty, may constitute duress.

Knowlton, J.

To set aside a contract for duress it must be shown that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity

and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under legal process issued for a just cause is duress that will avoid a contract.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime.

The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcome his, he may avoid the settlement.

4. Duress of Goods.

Hackley v. Headley. 45 Mich. 569.

Headley sues Hackley and McGordon for compensation for logs which he had cut, hauled, and delivered, under a contract with them. A dispute had arisen between the parties over the amount due, and Hackley had given Headley a note for \$4,000, which was less than Hackley admitted was due, taking a receipt in full settlement. Headley now claims that he is entitled to more money, as the settlement was forced upon him when he was badly in need of money, and so was made under duress.

Held, that this was not a case of duress of goods, which necessarily involves an illegal exaction to which the other party is forced to submit in order to obtain them.

Cooley, J.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly

said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is if anything duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.'

The case of *Vyne v. Glenn*, 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

5. Ratification of Contract Obtained by Duress.

The Oregon Pacific Railroad Co. v. Forrest. 128 N. Y. 83.

The Railroad Company and Garrison entered into a contract, whereby Garrison agreed to furnish steel rails to the railroad. He took bonds of the Company as security. Subsequently, the parties annulled the contract, and upon Garrison's refusal otherwise to redeliver any of the bonds held by him, the Company agreed that he might retain one hundred bonds, to which he would have been entitled had the contract been performed. The Company now seeks, several years later, to recover the bonds from Garrison's

executors on the ground that Garrison's refusal to deliver other securities unless he might retain those in suit, constituted duress of goods.

Held, that a contract originally voidable because of duress may be ratified.

Earl, J.

The facts constituting the duress were immediately known to the plaintiff and it was its duty to act promptly in repudiating the agreement which it had been induced to enter into by duress. Instead of so doing it never repudiated the agreement until it commenced this action, more than six years after the agreement of August thirteenth had been entered into and the bonds had been surrendered to Garrison; and during all that time down to the commencement of this action, it paid the semi-annual interest coupons upon the bonds. Even if it was induced to pay the interest during the life-time of Garrison, by promises on his part to extend financial aid in other ways to the plaintiff, the conduct of the plaintiff was, nevertheless, a complete and express ratification of the agreement of August thirteenth. If it surrendered its right to repudiate that agreement on account of duress it should have taken its remedy by holding Garrison to the agreement he made with it for financial aid; but it continued to pay the interest upon these bonds for several years after Garrison had failed to keep the alleged promise he had made for financial aid to the plaintiff and after all efforts and negotiations in that direction had ceased. During several years prior to the commencement of this action the payment of interest upon these bonds was entirely voluntary. It thus emphatically and repeatedly acknowledged the defendant's title to the bonds, and when this action was commenced it was too late to claim that they had been obtained by duress. One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly.

6. Undue Influence.

Valbert v. Valbert. 282 Ill. 415.

Francois Valbert executed deeds to two of his children during his lifetime for the purpose of equalizing a division of his property between them and the others. He afterwards made a codicil to his will expressing his intention to leave his property equally among his children. Francois was eighty-four years old at the time, was childish, and his actions were erratic. Franklin Valbert, another son, seeks to set aside these deeds on the ground of undue influence by Jay Valbert, one of the children to whom the property was conveyed.

Held, that in order to constitute undue influence, there must be such abuse of confidence that the grantor is deprived of his free agency.

Carter, C. J.

Undue influence is a species of constructive fraud which the courts will not undertake to define by definite words or rules. Influence, to render a conveyance inoperative, must be of such a nature as to deprive the grantor of his free agency. Undue influence means a wrongful influence,—such an influence as makes the grantor or testator, in the instrument executed, speak the will of another and not his own. It is not sufficient to avoid a will or deed that its execution was procured by honest argument, untainted with fraud. Proper and legitimate influence, honestly acquired, is not the exercise of undue influence. Such influence must be exercised and operate at the time of the transaction sought to be impeached. Something more than suspicion is required to prove the allegation of fraud. The evidence must be clear and cogent and must leave the mind well satisfied that the allegation is true. None of the defendants in error were present at the time of the execution of these deeds, and there is not the slightest evidence that tends to prove that they were exercising any undue influence on the mind of the grantor at that time.

Counsel for plaintiff in error argue that a fiduciary relation existed between the defendant in error Jay Valbert and his father, and that therefore the deeds were *prima facie* void. Conceding for the purpose of this case that such a relation did exist between the son and the father, the execution of deeds under such circumstances will be held valid if it appears it was entered into with full knowledge of the nature and effect of the deeds and resulted from the deliberate, voluntary and intelligent desire of both and not through influence engendered by their relationship. The evidence, as we have already said, shows conclusively that the execution of these deeds was the result of the voluntary wish of the grantor, and not because of any undue influence exercised upon him by the son or any other person connected with the transaction.

7. Effect of Undue Influence.

Bensel v. Anderson, 85 N. J. E. 391.

Bensel, a man ninety years of age, was induced by his son-in-law, Kline, to indorse notes jointly with Anderson, with whom Kline was engaged in business. Successive notes were so indorsed for the accommodation of Kline and Anderson until the business failed and judgments were recovered by the bank upon several of the notes. This action is brought by Bensel to avoid the effect of these indorsements, which he contends were secured by the undue influence of Kline.

Held, that agreements secured by undue influence may be avoided both as to the person with whom they are made, and as to third persons for whose benefit they are made.

Backes, V. C.

The determination of the issue, if it were confined to Bensel and Kline, would involve no difficulty in condemning the transaction as fraudulent. For here we have a tottering old man, in years far beyond the allotted time, dependent for his temporal wants entirely upon his children, and in a large measure upon his son-in-law, a member of his household, in whom he undoubtedly reposed great confidence, involving himself, at the latter's instance, in obligations which in nowise could have benefited him, and if permitted to stand would result in sweeping away his meagre competence, leaving him impoverished, a subject of charity, or, possibly, a public charge. From such calamity, equity in a measure shields him. In all transactions between parties occupying relations, whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed, and who has acquired an advantage, to show affirmatively not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice, independently of the other. The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward, or husband and wife exists, but in every instance where the relation between the donor and donee is one in which the latter has acquired a dominant position. And where one so situated is despoiled of all his property, a rule putting an additional burden upon the beneficiary is brought into play. Mr. Justice Garrison explains it with marked clarity thus: "That a person already aged or infirm, or otherwise dependent, should give to the one upon whom he thus depends practically his whole living beyond recall, and at the very time when apparently he had most need to retain it, raises in the mind of a chancellor the presumption that the donor may not have appreciated the irrevocable character of his act or that he did not foresee its legal consequences to himself. This presumption of apparent improvidence gives rise to [a] special rule which may be called the rule of independent advice. By force of this rule, if a person upon whom another has in fact come to be dependent accepts a gift from such dependent person of all his or her estate, a court of equity, moved by the apparent improvidence of such a gift, casts upon the donee the burden of showing that the donor had the benefit of proper independent advice. Proper independent advice in this

connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction." These beneficent rules of equity have been chiefly employed in cases of outright gifts, but their underlying principles call for their application as vigorously, in circumstances where the subject, by enmeshing and entangling himself, has his property taken from him by legal process, as where he gives it away. The result is the same. And, when inspired by confidential relation, the presumption of undue influence is as much excited in the former as in the latter instance, and the rules applicable to the one are as fitting to the other.

The important inquiry in the case then is, is the vice in Bensel's undertaking—the constructive fraud—chargeable to Anderson? Courts of equity have been prone to disallow contracts in favor of third parties, where advantage is derived through confidential relations, and the opinions plainly indicate how far the beneficiary must go to overcome impeachment on this ground. The authorities, in instances of duress by parents, where parental influence was presumed to prevail after the child had arrived at legal age, are especially apposite, inasmuch as the complainant's advanced years and dependency put Kline in the ascendant position. Other cases where trust and confidence subsisted are also in point. In *Berdoe v. Dawson*, 34 Beav. 603, two sons mortgaged their estate to secure a debt of the father. They were the age of twenty-five and twenty-three, respectively, and lived with the father. In setting aside the mortgages, the master of the rolls, Sir John Romilly, said that, "When a person executes a deed by which his father, or any other person nearly related and connected with him, or who, from any other cause, has necessarily a considerable influence over him is benefited, then the person who claims the benefit of that deed is bound to establish two things—he is bound to establish, in the first place, that the person who executed the deed knew what he was about when he executed it; and, in the next place, he is bound to show that it was made of his own free will, and unbiased by and without being subject to that influence which he could not easily resist. The cases upon the subject are exceedingly strong in showing that this sort of security cannot be relied upon."

VI.

LEGALITY OF SUBJECT MATTER.

An agreement does not result in a valid contract if its object is illegal. Such agreements may contemplate a violation of positive law or a refusal to do acts required by law. They may involve the commission of a crime or the doing of a civil wrong. They make a contract void, not voidable. A distinction exists between agreements to violate statutes enacted for the benefit of the public and agreements to violate statutes enacted for revenue purposes or for direction as to the conduct of business. The first are void, but the second are valid. It is a matter of considerable nicety to draw the line between these two classes of cases. In general, statutes regulating trade or business, and traffic in intoxicating liquors, as well as statutes prohibiting the making of contracts on Sunday, the taking of usury, gaming and lotteries are held to be for the benefit of the public. Contracts made in violation thereof are void.

Sunday contracts are illegal if the entire contract is completed on Sunday. If preliminary terms are agreed upon on Sunday but the contract is not completed before the following day, the contract is valid. Some states allow ratification of a contract made on Sunday, though the majority do not. If goods are delivered pursuant to a contract made on Sunday, the seller may recover their value on the theory of an implied contract, but may not sue on the contract itself.

Usury consists of taking a greater amount of interest than the law allows. In most jurisdictions, the effect is to prevent the recovery of the illegal interest merely, though in some states the entire transaction is void. Gaming contracts include wagers, bets, card playing for money and engaging in sports for a stake. A lottery is the payment of money for a consideration which depends upon chance. Stock transactions which do not involve an actual purchase or sale of securities are held to be illegal contracts of this nature. Most states have passed statutes regulating such contracts.

Other contracts are void as against public policy because of their mischievous tendency. They may or may not be expressly prohibited by common law or by statute. In general, any agreement of an immoral or fraudulent tendency when the public is involved, or of a sort calculated to injure the public welfare, comes under this heading. Such agreements include contracts injuring the public service, perverting the course of justice, ousting

the courts of jurisdiction, abusing legal process, affecting freedom of marriage, together with contracts against good morals, contracts intended to secure secret advantages in compositions with creditors, and contracts in restraint of trade.

When a contract is illegal in part only, and that part may be separated from the rest, the valid portion may be enforced. If, however, the illegal portion goes to the root of the whole matter, the contract is void. In an executory contract which is illegal, a person who has paid money under it may withdraw and recover back the money until such time as the contract is partly executed. Courts allow this opportunity to withdraw on the ground that there exists a right to recede so long as the party may repent without having been seriously tainted by the illegality.

1. Effect of Illegality.

Atwood v. Fiske. 101 Mass. 363.

Joseph Atwood, a bookkeeper in the employ of the defendants, was charged by them with embezzlement. The plaintiffs gave two mortgages and notes, now overdue, to the defendants, in consideration of their forbearance to prosecute Joseph Atwood, and they now bring bills in equity to secure cancellation of the notes and mortgages on the ground that the contract was illegal.

Held, that the court will not interfere on behalf of either party to an illegal contract.

Ames, J.

A note, given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal.

But it has also long been settled that if the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language

of Lord Chief Justice Wilmut, "all writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back." In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto*.

2. Agreement to Commit a Crime.

Arnold v. Clifford. 2 Sumner (C. C. U. S.) 238.

The defendant, who had secured the publication in a newspaper of a libel concerning the plaintiff, agreed to indemnify the publisher against any consequences arising from the publication. The question arises whether such an agreement is valid.

Held, that an agreement to commit a crime, or to indemnify one who commits a crime, is illegal and void.

Story, J.

A promise to indemnify another for doing a private wrong, or for committing a public crime, is against public policy, and is void in law. It is common learning, that among tort-feasors, who are knowingly such, there can be no contribution for damages recovered against any one of them, even although there be a promise of indemnity or contribution. The same doctrine applies to cases of indemnity for the commission of a public crime. No one ever imagined that a promise to pay for poisoning of another, was capable of being enforced in a court of justice. It is universally treated as illegal, it being against the first principles of justice, and morals, and religion. The man who is hired to publish a libel against another, is guilty of an offence equally reprehensible in morals, though not so aggravated in its character; for the publication may not only be ruinous to the reputation of the individual aspersed, but may involve an innocent family in agonizing distress, and, perhaps, destroy its peace forever. There is no such right recognized in civil society, or at least in our forms of government, as the right of slandering or calumniating another. The liberty of the press does not include the right to publish libels. Much less does it include the right to be indemnified against the just legal consequences of such publications.

3. Agreement to Commit a Private Wrong.

Hinnen v. Newman. 35 Kas. 709.

Newman, an auctioneer, was employed to sell two horses. He induced Hinnen, the plaintiff, to buy in the horses for him, agreeing to reimburse Hinnen, and Hinnen made the purchase. Newman subsequently got possession of the horses, but Hinnen claims that they belong to him, and seeks to recover them from Newman.

Held, that a contract to commit a private wrong is illegal, and neither party can take advantage of the contract.

Johnston, J.

The whole transaction between these parties contravenes public policy and is clearly illegal, and the general rule is that an action founded upon an illegal transaction, where the parties are *in pari delicto*, cannot be maintained. In all such cases the courts refuse to assist the parties to carry out or to reap the fruits of the illegal transaction, but will leave them in the condition in which they were found.

The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practiced fraud, which, when detected, deprives him of anticipated profits, and subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by the exertion of its powers by shifting the loss from the one to the other, or equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.

Here, both of the parties before the court were directly concerned in the transaction. Together they secretly conspired to and did commit a wrong against others. The transaction tainted with illegality was voluntarily entered into and consummated by them. There was no restraint upon the plaintiff compelling him to carry out the unlawful purpose, nor does any fact appear which affords him any excuse for his misconduct or that would bring him within any of the exceptions to the rule that have been stated. He concedes that the contract was illegal, but to escape the penalty which the law justly imposes upon a guilty participant, he says that the property was bid in in his own name, and paid for with his own funds, and he claims that his right of action is based on these facts rather than on the illegal transaction, and that he can make out his cause of action without the aid of that transaction. It is claimed that the true test for determining his right of recovery is by considering whether he can establish his case without the necessity of having recourse to the illegal transaction, and if so, he must prevail. This test is applied for the only purpose of determining whether the parties before the court are *in pari delicto*, in which case they are remediless. There is little necessity or room

for the application of this test where the plaintiff and defendant are so obviously in equal fault as we have seen the parties are in this case. But if the test proposed is applicable, it will not avail the plaintiff. The only interest or right of possession which he has in the property is derived from the sale, which is confessedly illegal. To establish his case, he must show that he purchased the property at that sale, and he thereby brings the illegal transaction into the case. Both parties claim under that sale—the plaintiff because he bid in the property in his own name, and the defendant because it was bid in for him and not for the plaintiff. Neither of them can come into court with clean hands and ask anything under the fraudulent and illegal transaction. If the possession of the property was changed and the defendant were in court seeking to obtain possession of it, he would be refused assistance, although from the findings it appears that the property was purchased solely for him. He is in no better position than the plaintiff, and would be entitled to no greater consideration.

4. Agreement to Violate Directory Statute not Void.

Bowditch v. New England Mutual Life Insurance Co. 141 Mass. 292.

Burgess, a member of the finance committee of the defendant company, borrowed money from it in the name of his son, in violation of a statute prohibiting loans to officers of such companies. His trustee now sues to recover bonds put up as collateral security for notes signed by Sidney W. Burgess, his son.

Held, that although such a contract is prohibited in the case of an individual, the contract itself does not thereby become void.

Morton, C. J.

The statute provides that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same, or be surety for such loans to others, or directly or indirectly be liable for money borrowed of the company."

It is a rule universally accepted, that, if a statute prohibits a contract in the sense of making it unlawful for anyone to enter into it, such a contract, if made, is wholly void, and cannot be enforced. But it is often a difficult question to determine whether a statute forbidding an act to be done, or enjoining the mode of doing it, is prohibitory, so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. Though it may be impossible to formulate a rule which will reconcile all the adjudications, yet the decisions recognize a clear distinction between these two classes of cases. There is a large class of cases, both in this country and in England,

in which statutes have enacted, in substance, that goods should only be sold in certain measures, or in a certain manner, or after being inspected and branded by public officers; and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void. The purpose of such statutes is to protect the buyer from the imposition of the seller, a purpose which would be wholly thwarted unless the contracts are held void, and therefore the intention of the legislature to make them void is inferred.

So statutes prohibiting any work on the Lord's Day, except work of necessity or charity, have been construed to make entirely void any contract made in violation of their provisions. On the other hand, there are numerous cases where statutes forbid certain acts to be done, and in a sense forbid certain contracts to be made, and yet it is held that contracts made in contravention of the statutes are not void. When usurious contracts were forbidden by our laws, under a penalty of forfeiting threefold the amount of interest reserved or taken, the act of making such a contract was illegal, but the contract was not void. The imposition of the defined penalty showed that the legislature did not intend that the contract should be wholly void, as this would be imposing an added penalty.

Many other cases might be cited, in which it has been held that contracts made in violation of the provisions of statutes are not void, upon the ground that the statutes are intended merely to be directory to the officers or persons to whom they are addressed, and not to be conditions precedent to the validity of contracts made in reference to them. Each statute must be judged by itself as a whole, regard being had not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract.

For the reasons stated, we are of opinion that the notes signed by Sidney W. Burgess are valid contracts, which can be enforced by the corporation.

5. Agreement to Violate Statute for Revenue Purposes Only Not Void.

Aiken v. Blaisdell. 41 Vt. 655.

Blaisdell bought liquor on credit from Crapo and Aiken. Crapo and Aiken, through an oversight, did not have the federal license required by law, when they sold the liquor. In an action for the price, the defense is in part that any sale by them was illegal and void.

Held, that a contract in violation of the provisions of a statute enacted for revenue purposes only, is not void.

Pierpoint, C. J.

The question recurs: Was this contract made in violation of the act of congress? Or in other words, did congress, by the act referred to, intend to prohibit such a transaction, so as to invalidate the sale? This, we think, must be determined by the object, intent and purpose of congress in passing the law under consideration. Did congress intend that the act should operate upon the business community, or only upon the persons that should engage in the business? It was manifestly not the intention of congress, by the enactment referred to, to make any kind of business illegal, or to prohibit it. The purpose was not to diminish, restrain, control, or regulate business. The transaction of all kinds of business was just as legal after the passage of the law as before. The law is strictly a revenue law, the sole object being to get money into the treasury, and that is accomplished by requiring all persons that engage in certain kinds of business to contribute a certain amount towards paying the liabilities of the government. Its object is to raise money, and not to regulate the business of the country. If a man engages in the kind of business referred to, he is engaged in a legal business, whether he has a license or not. If he has no license, he has no legal right to do it, and subjects himself to the penalty. The law, we think, was intended to operate upon the person, and not upon the business. If the object of the law had been to prohibit certain kinds of business, or to regulate it, with a view to its effect upon public morals or public security, by limiting it in its extent, or the place where it is to be carried on, or the persons who shall conduct it, or otherwise, in all such cases the law operates upon the business as well as the person; revenue mainly in such cases is not the object, it is only incidental, or the means by which the law regulates and controls the business. The act in question imposes no restrictions upon the business; all are at liberty to engage therein where, and when, and to any extent they choose upon paying for the license.

6. Agreement to Violate Statute: Sunday Contracts.

Cranson v. Goss. 107 Mass. 439.

A note, dated the following Wednesday, was made by Goss on Sunday to the order of George Wells, and was by him indorsed to Cranson. Cranson had no knowledge of the fact that the contract for which the note was given was completed on Sunday, nor that the note was made at any time other than its date indicated.

Held, that a holder in due course of a note made on Sunday may enforce it against the maker.

Gray, J.

The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of

the Lord's Day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.

The general principle was long ago stated: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff; by accident, if I may so say. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own statement or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it."

It is upon this principle that a bond, promissory note or other executory contract, made and delivered upon the Lord's Day, is incapable of being enforced, or, as is sometimes said, absolutely void as between the parties. And it follows that as between them it is incapable of being confirmed or ratified; for, in suing upon the original contract after its ratification by the defendant, it would still be necessary for the plaintiff, in proving his case, to show his own illegal act in making the contract at first.

Upon the same principle, if the contract has been executed by the illegal act of both parties on the Lord's Day, the law will not assist either to avoid the effect of his own unlawful act. Thus if the amount of a preexisting debt has been paid and received on Sunday, the law will neither assist the debtor to recover back the money, nor the creditor, while retaining the amount so paid, to treat the payment as a nullity, and enforce payment over again. If a chattel has been delivered by the owner to another person on the Lord's Day by way of bailment or pledge, the latter may retain it for the special purpose for which he received it; or, if it has been delivered to him on the Lord's Day by way of sale or exchange, it cannot, at least if he has at the same time paid or delivered the consideration on his part, be recovered back at all. If a chattel has been sold and delivered on the Lord's Day without payment of the price, the seller cannot recover either the price or the value; not the price agreed on that day, because, whether the property is deemed to have passed to the defendant, or to be held by him without right, there is no ground upon which a promise to pay for it can be implied.

But if the whole evidence shows a complete cause of action, independently of any participation of the plaintiff in an illegal transaction, he may recover. Thus an agreement made on the Lord's Day

for the use and occupation of the land is void; but a subsequent entry upon and occupation of the land will sustain an action upon an implied promise to pay what its use is reasonably worth. So if a written or oral request for the performance of services, and promise to pay a certain compensation therefor, is made and received on the Lord's Day, but there is no proof of assent to the request on that day, and the services are performed on a subsequent day, before the request has been withdrawn, the promised compensation may be recovered.

The law simply refuses to allow either party to invoke any aid from the court to give effect to an illegal transaction in which he has taken part. An additional illustration of this is afforded by a recent case in this court, in which it was held that if a bargain is made on the Lord's Day for a sale of chattels (which is of itself void and incapable of ratification) and the chattels are delivered and accepted on the following day, with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither party can be permitted to prove the terms, either as to price or warranty, agreed between them on the Lord's Day.

A promissory note given and received on Sunday, and therefore void as between the original parties, might be equally void in the hands of a subsequent holder who took it with notice of the original illegality. Even if the note bore date of a Sunday, however, that mere fact would not be conclusive evidence that he took it with such notice; for, though dated on Sunday, it might have been delivered on another day and so valid even as between original parties.

In the present case, it is agreed that the contract which was the consideration of the note in suit was made on Sunday, and that the note was made, signed and fully delivered on Sunday to the original payee. Clearly therefore he could not have maintained an action upon it.

But it is also agreed that the note bears date of a secular day; and that the plaintiff is a bona fide holder of the note, for a valuable consideration, and took it before it became due, without notice of any defect, illegality or other infirmity in the same. The plaintiff therefore, not having participated in any violation of law, and having taken the note before its maturity for good consideration and without notice of any illegality in its inception, may maintain an action thereon against the maker. To hold otherwise would be to allow that party, who alone had been guilty of a breach of the law, to set up his own illegal act as a defense to the suit of an innocent party. This view is supported by the judgments of all the courts, English and American, that have considered the question. And it is in accordance with the decisions of this court upon notes made in violation of other statutes, except those against usury and gaming, which last have often contained peculiar provisions, and, as observed by Chief Justice Shaw, "declared that the note should be absolutely void to all intents and purposes, or, as is sometimes said, applied to the contract and not to the party."

7. Agreement to Violate Statute: Dealing in Futures.

Irwin v. Williar. 110 U. S. 499.

Irwin and Davis operated a flour mill in Indiana. Davis had bought wheat futures of the plaintiff, Williar, in Baltimore. After the death of Davis, Williar sues Irwin, as surviving partner, to recover a balance due on these transactions. Irwin defends upon the ground that the contract was a gambling contract, and therefore illegal.

Held, that a contract for the purchase and sale of goods for future delivery is valid unless the parties intend merely to speculate in the rise and fall of prices, and the goods are not to be delivered.

Matthews, J.

The generally accepted doctrine in this country is, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by statute altering the common law in that respect.

Brokers who [have] negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.

In England, it is held that [such] contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable, while generally, in this country, all

wagering contracts are held to be illegal and void as against public policy.

8. Agreement to Violate Statute: Bucket Shops.

Smith v. Western Union Telegraph Co. 84 Ky. 664.

Smith ran a bucket shop. The Telegraph Company refused to continue its ticker service for him unless he would agree to sign a contract to send by it all his messages at message rates. This he refused to do, and sues to restrain the Company from discontinuing the ticker.

Held, that a bucket shop is illegal, and that a carrier of messages will not be required to deal with it.

Bennett, J.

We are satisfied from the proof in the case that the contract with the appellee, by which appellant was furnished with the market reports and the use of the "ticker," was necessary to enable the appellant to carry on the business. In this kind of business nothing is actually bought or sold; nor do the parties intend an actual sale of the commodity which they pretend to deal in. They merely wager on the market price of the commodity at some specified time in the future. A mere statement of the character of business done by appellant shows it to be a species of gambling as well defined and as reprehensible as that of keeping a faro bank or a dice machine, and is, therefore, illegal and contrary to public policy.

The question then is, can the appellee avail itself of the fact that appellant was engaged in an illegal business as an excuse for withholding the market reports from him and withdrawing the ticker, both of which were used by appellant in carrying on said business.

The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do, or cause the doing of, unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons.

These reports were the essence—the very sinew—of appellant's gambling business, and without the prompt supply of which his business was a failure. Can the appellee be compelled to continue the supply? We think not. Not upon the ground that the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business; for it says that it was willing to furnish the reports as long as the terms of the contract suited it, but upon the ground that appellant was engaged in a gambling enterprise, which is contrary to law, good morals and public policy. It is for the sake of the law and the best interests of society that we relieve the appellee from continuing to furnish to appellant the reports.

It is contended that, although the appellant may be engaged in a gambling business, the appellee has no right to withhold the reports from him because of its position as a public servant, bound to serve the public indiscriminately and without questioning the motives or the purposes of the persons who employ it.

The general rule is, that a telegraph company is under no obligation to contract to communicate an illegal or an immoral message.

This rule is not only correct as to telegraph companies, but it applies to all persons who undertake to carry for the public. A contrary rule would convert a telegraph company into a public vehicle for the purpose of communicating unlawful, treasonable or felonious schemes of all kinds, or the consummation of any and all kinds of illegal transactions and enterprises. Of course, a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken, or has misjudged the tenor or purpose of the message, it would be held responsible to the injured party for any damage sustained by reason of the refusal.

9. Agreement to Violate Statute: Lotteries.

Hull v. Ruggles. 56 N. Y. 424.

Hull sold Ruggles' firm candy and silverware, the candy being put up in prize packages, some of which contained tickets entitling the holder to a special piece of silverware. In an action by the seller for the price, the defense is that the contract was for purposes of a lottery, and hence illegal.

Held, that a consideration to be acquired by chance or lot is a lottery, and that a contract based upon it is void.

Folger, J.

The Revised Statutes declare that every lottery, game, or device of chance in the nature of a lottery, by whatsoever name it may be called, other than such as have been authorized by law, shall be deemed unlawful. It must have been set on foot for the purpose of disposing of property. It cannot be doubted, but that the purpose of the defendants, in contracting for the goods sold to them by the plaintiff, was to dispose of them to the public at more than their real value. This was to be effected by the incitement and temptation held out to each purchaser, and while he paid more than the real value of the package that he bought, he also bought the chance of obtaining another article much exceeding in value the price paid. He would it is true get some real value, but so much less than the price that he paid, that he would not have been likely to pay that sum for it, but for the chance, and the hope excited by the chance, that he might also get therefor another article of greater value than the amount paid. This was a lottery within the meaning of the statute. It was to set up chattels to be distributed by lot to any person who should

have paid a valuable consideration for the chance of obtaining such chattels. It was a lottery, or device of chance in the nature of a lottery. It is directly within the definition of Worcester: "A hazard in which sums are ventured for the chance of obtaining a greater value."

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery. It was unauthorized by law. It therefore fell within the prohibition of the statute.

We are not left to the rules of the common law alone to determine whether this conclusion of law is correct. The statutes against lotteries have provisions touching the subject. Section 38 of the Revised Statutes above cited declares that every sale of any goods, for the purpose of aiding in a lottery is void and of no effect. It is difficult to perceive how a sale of goods so packed and arranged as to enable the purchaser, without alteration or readjustment of them, to carry out a scheme, which when accomplished is an unlawful lottery; and sold thus with knowledge, or with reasonable cause for belief, that the purchaser by the disposal to the public of the goods thus arranged intended to violate the statutes against lotteries, is not a sale for the purpose of aiding in such lottery. It cannot be otherwise.

10. Agreement to Violate Statute: Usury.

Lloyd v. Scott. 4 Peters (U. S.) 205.

Scholfield granted Moore an annual rent charge of \$500 on certain lands belonging to him in consideration of a payment of \$5,000 by Moore to Scholfield. The incumbrance might be discharged at any time on the payment of \$5,000 by Moore. Scholfield then sold the land subject to the terms of this agreement to Lloyd, the plaintiff. A statute of Virginia prohibited the taking of more than 6% interest, whether directly or indirectly. This action is brought by Lloyd to recover goods and chattels which Scott, on behalf of Moore, had taken on default of one payment of the annuity.

Held, that under a statute prohibiting the taking of more than a certain rate of interest, the contract is void.

M'Lean, J.

The requisites to form an usurious transaction are three:

1. A loan either express or implied.
2. An understanding that the money lent shall or may be returned.
3. That a greater rate of interest than is allowed by the statute, shall be paid.

The intent with which the action is done, is an important ingredient to constitute this offense. An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there is no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract, or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or as it was then called, the loaning of money at interest, was deemed a very high offense. But since the days of Henry VIII, the taking of interest has been sanctioned by statute.

In this country, some of the states have no law against taking any amount of interest, which may be fixed by the contract.

The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act because it is prohibited by law.

The purchase of an annuity, or any other device used to cover an usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced.

Where an annuity is raised with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. On this point there is no contradiction in the authorities.

If a party agree to pay a specific sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty.

Where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

The principle seems to be settled, that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. A stranger must "take heed to his assurance, at his peril"; and cannot insist on his ignorance of the contract, in support of his claim to recover upon a security which originated in usury.

II. Agreement Against Public Policy: Influencing Official Action.

Brooks v. Cooper. 50 N. J. E. 761.

Cooper published the "Gazette" and Brooks the "Star of the Cape," both newspapers in Cape May County, N. J. They agreed that the acts of the legislature should be published by the "Star of the Cape" and that both newspapers should divide the profits. An act of the legislature empowered the governor and other officers

to select a newspaper in each county to publish such acts. A bill in equity is brought by Cooper to compel division of the profits.

Held, that the contract was against public policy and void.

Lippincott, J.

The contract not being fulfilled between the parties, the question arises, Can it be enforced, or is it so manifestly contrary to public policy, in contravention of the statute, and so injurious to the public good, that it defeats itself?

In determining this there must be kept in view the general rule of law that, where there is no statutory prohibition, the law will not readily pronounce an agreement invalid on the ground of policy or convenience, but is, on the contrary, inclined to leave men free to regulate their affairs as they think proper. Where, however, a contract is of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large, everyone has an interest in its suppression and it will be pronounced void from a due regard to the public welfare.

Now, it is only upon judicial determination that a contract contravenes the policy of some public statute, or some well known rule of law, that it is held to be void.

Turning to the judicial decisions upon this subject, we find them so numerous and of such variety that a consideration of them at any length is not practicable. The general principles governing the matter are well established by a long line of authorities, and in the case now before the court they do not appear to be of difficult application.

It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required.

Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement.

Any contracts which have for their object the influencing the action of public officials are void as against public policy. An agreement whose object or tendency is to influence any officer of the state in the performance of a legal duty, partially or completely, is void.

It is distinctly held that an agreement for compensation for procuring a contract from the government of our own, or that of another, country, is against public policy and void. An agreement between two candidates for the same office, that one shall withdraw, and the other, if successful in the attempt to obtain the office, shall divide the fees with him, is void as against sound public policy. All agreements, for financial consideration, to control or influence the business operations of the government, or the appointment of public officers, are void as against public policy, without reference to the question whether improper measures are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptations by refusing them recognition in the courts. And so considerations of the same kind, of inferior moment, apply, whenever the necessary or even probable effect of the contract will be to divert any public servant from the path of duty, or cause favoritism or interest to prevail in the determination of questions which should be examined with a view to the general good and the just claims of the parties in interest.

Such an agreement as the one now under consideration is simply, in plain language, a financial bargain between two seekers after public position to get one or the other out of the way, so that the other may succeed in obtaining it, and it must be held illegal and void.

12. Agreement Against Public Policy: Ousting Court of Jurisdiction.

Miles v. Schmidt. 168 Mass. 339.

The plaintiff sues on a written contract which contained a provision that in case of any alleged violation thereof, the dispute should be settled by referees whose decision should be final.

Held, that a contract ousting the courts from their jurisdiction is illegal and void.

Morton, J.

Perhaps, if the question were a new one, no objection would be found to permitting parties to select their own tribunals for the settlement of civil controversies, even though the result might be to oust the courts of jurisdiction in such cases. But the law is settled otherwise in this state. When the question is a preliminary one, or in aid of an action at law or suit in equity, such, for instance, as the ascertainment of damages, an agreement for arbitration will be upheld. The agreement for arbitration in this case expressly provided, amongst other things, that the referee shall "hear the parties and determine whether or not there has been any violation and what damage either party has sustained," and that "the decision of a majority shall be final and binding."

13. Agreement Against Public Policy: Secret Advantage in Composition with Creditors.

The Hanover National Bank v. Blake. 142 N. Y. 404.

Blake & Company effected a composition with creditors for forty cents on the dollar, paid by four notes, the last two of which were indorsed by Mrs. Blake. The bank, one of the creditors, insisted upon her indorsing all of the notes. It now sues Mrs. Blake upon the third of these notes, the defense being that the agreement whereby the bank received a greater security than the other creditors made the whole transaction void as against public policy.

Held, that although any advantage acquired by one creditor over the other parties to a composition is void, according to the New York rule, the entire composition is not therefore avoided.

Gray, J.

The general principle has been long settled in England and here that a secret agreement which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality; and that equality would be destroyed if the secret agreement were given effect. Where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself.

From all the early cases in England and in this state the inference from the decisions is, not that the composition agreement is avoided [by the secret giving of additional security], but the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, is void and inoperative. The law would set aside all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors. It is the secret agreement itself which is fraudulent and void.

It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement for any purpose. We assert a wholesome rule and one which works a just result, if we hold that the secret and fraudulent agreement, itself, is illegal and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition; though it has support

in some English cases. It seems to me the case falls easily within the rule, which permits a severance of the illegal from a legal part of the covenant.

Here the agreement with other creditors for a composition was lawful and valid (unless they should elect to rescind it upon the discovery of the secret agreement, an element not present); but the agreement for, and the giving of, additional security was unlawful and void. Is there any reason why the bad may not be rejected and the good retained? We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory they may not so elect, and may rely that the creditor, secretly seeking to obtain some promise of advantage over them, will be prevented from enforcing it and from gaining anything by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation, which, from its inception, was unlawful and which the law annuls. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement.

14. Agreement Against Public Policy: Secret Advantage in Composition with Creditors. (Conflicting Rule.)

Frost v. Gage. 3 Allen (Mass.) 560.

Richard Frost made a composition with creditors, Gage being the assignee. In order to get Gage to assent to the assignment, Frost's son, also a creditor, agreed to make no claim for a dividend against Gage and to give him a note for part of the debt due Gage from his father. The son now seeks his share of the estate, in spite of this agreement.

Held, that according to the Massachusetts rule any fraud upon creditors in a composition with them vitiates the entire transaction as to persons participating in the fraud.

Bigelow, C. J.

The fraud in which [the plaintiff] participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate.

It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defense the illegality of a transaction on which a cause of action is founded. Such defenses are allowed, not out of favor to defendants, or to protect them from the effects of their unlawful contracts, but on the grounds of public policy, which does not permit courts of justice to be used to aid either party in enforcing contracts which are unlawful or tainted with fraud, but leaves them in the condition in which their illegal or immoral acts have placed them.

15. Agreement Against Public Policy: Restraint of Trade.

Anchor Electric Co. v. Hawkes. 171 Mass. 101.

The Anchor Electric Company sues to enforce the terms of a contract between itself and Hawkes, who had sold his interest in a business to the Anchor Company, and had agreed not to compete with it for a period of five years.

Held, that an agreement for a reasonable restraint of trade is not illegal and will be made effective.

Knowlton, J.

From very early times certain contracts in restraint of trade have been held void as against public policy. They are objectionable on two grounds: they tend to deprive the party restrained of the means of earning a livelihood, and they deprive the community of the benefit of his free and unrestricted efforts in his chosen field of activity. The distinction was long ago taken between contracts involving a partial restraint of trade and contracts involving a general restraint of trade, the former being held valid if not unreasonable, and the latter invalid. The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the

merchants of every country leave little danger to the community from an agreement of an individual to cease work in a particular field. The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old. The right to make reasonable contracts of this kind in connection with the sale of the good will of a business is well established. But the particular provisions which are reasonably necessary for the protection of the good will of many kinds of business are very different now from those required in the days of Queen Elizabeth. Then the courts had occasion to inquire whether a limitation upon the right to engage in the same business as that sold was unreasonable because it included a town instead of a single parish, or extended a distance of ten miles instead of five. Now the House of Lords in England has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable. Because in early times it seemed inconceivable that an agreement to refrain from establishing a business of the same kind anywhere in the kingdom should be necessary to the protection of the good will of any existing business, it was laid down as an arbitrary rule that agreements so comprehensive in their terms were void. Thus the distinction between a general restraint of trade and a partial restraint of trade grew up. Contracts applying to any territory less than the whole kingdom were considered in reference to their reasonableness, having regard to the purpose for which the contract was made. By the unanimous decision of the House of Lords, it is now settled in England that a covenant unrestricted as to space, not to engage in a particular kind of business for twenty-five years, made in connection with the sale of the property of a manufacturing establishment, is valid, if, having regard to the nature of the business and the limited number of its customers, it is not wider than is necessary for the protection of the covenantee, nor injurious to the public interests of the country, as were found to be the facts of that case. Arbitrary rules which were originally well founded have thus been made to yield to changed conditions, and underlying principles are applied to existing methods of doing business. The tendencies in most of the American courts are in the same direction.

[In *United Shoe Machinery Co. v. Kimball*, 193 Mass. 351, it is stated, quoting *Anchor Electric Co. v. Hawkes*, *supra*, "Under this rule in conceivable cases, a covenant may be valid which is unlimited both in time and space."]

16. Effect of Partial Illegality.

Eastern Expanded Metal Co. v. Webb Granite and Construction Co. 195 Mass. 356.

The Metal Company sues to recover the value of work done for the defendant under a building contract which, unknown to the plaintiff, had in it a specification which violated the ordinances of the city of Boston, where the work was to be done. The plaintiff had stopped work upon the discovery of the illegal provision, but the defendant contends that it is entitled to recover nothing on account of the illegality of the contract.

Held, that when a contract is partly legal and partly illegal, if the two elements may be separated, the plaintiff may recover under that portion of the contract which is legal.

Knowlton, C. J.

It has been held in many cases that, where the matters called for in the contract that render it illegal do not involve moral turpitude, but are merely *mala prohibita*, either party, while it remains executory, may disaffirm it on account of its illegality and recover back money or property that he has advanced under it. If the contract has been executed the court will not relieve either party from the consequences of his own violation of law. But so long as it is entirely unexecuted in that part which the law forbids, there is a *locus penitentiae*. Most of these cases relate to the recovery of money or property that has been advanced under the illegal contract which is subsequently repudiated. In the present case labor and materials for the improvement of real estate were furnished by the plaintiff. In this Commonwealth, when labor and materials are furnished and used upon real estate under a special contract, and for reasons which are not prejudicial to the plaintiff the contract becomes of no effect, it is held that the party furnishing them may recover upon a *quantum meruit* for their value as a benefit to the real estate. When labor and materials have been furnished upon real estate under a contract which contains an illegal element under a prohibitory statute, and when the contract remains entirely executory in that part which is illegal, and is disaffirmed because of its illegality, the disaffirming party has the same right to have compensation for the benefit conferred upon the real estate that he would have to recover for money or property received by the other party before the disaffirmance of such a contract.

17. Effect of Partial Illegality.

Lindsay v. Smith. 78 N. C. 328.

Lindsay was indicted for erecting and maintaining a public nuisance by constructing a dam across a certain creek. The de-

defendants agreed for a certain sum to maintain a ditch through Lindsay's land, and that the indictment should not be prosecuted. They failed to construct the ditch, and Lindsay sues for breach of their contract.

Held, that when a contract, illegal in part, is not divisible, the entire contract is void.

Bynum J.

The general doctrine was admitted, that no executory contract, the consideration of which is against the public policy or the laws of the state, can be enforced in a court of justice. It was further admitted that when the consideration of a contract is the compounding a felony, or the suppressing a prosecution of an offense strictly public in its character, such a contract cannot be enforced. But it was contended that this doctrine applied only to felonies, or at most to public misdemeanors, and that it had no application to offenses, though indictable, yet private in their nature, as affecting an individual or a community, as in this case. In our state it has been decided directly otherwise.

So in civil cases, all contracts prohibiting parties from bringing an action and all agreements purporting to oust the courts of their jurisdiction; all agreements to pay money to stifle or suppress evidence or to give evidence in favor of one side only, or not to appear as a witness in a civil suit; all contracts, bonds, indemnities and undertakings, tending to induce sheriffs, clerks, jailors and other public officers to violate or neglect their duty or made to protect them from the consequences of their misconduct, are absolutely null and void, as contracts obstructing or interfering with the administration of public justice, and as being contrary to the public policy of the law.

But counsel contends that there are two covenants in this sealed instrument, and that they are divisible, part being good, and part bad; that the contract of the defendants is to do two things: first, to dismiss the indictment, which is illegal and void, but second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought. In regard to this proposition the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other is bad, the one may stand and be enforced, although the other fails, under the maxim *utile per inutile non vitiatur*. But where there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and illegal act. There was but one indivisible consideration moving from the plaintiff, to wit: the sum of fifty dollars, and for that consideration, the defendants covenanted to do two things—the one legal and the other illegal. The consideration cannot be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, enters into and supports both promises.

18. Effect of Withdrawal from Illegal Contract.

Hermann v. Charlesworth. (1905) 2 K. B. (Eng.) 123.

Miss Hermann made a contract with the defendant, editor of the "Matrimonial Post and Fashionable Marriage Advertiser," whereby she paid him £52, of which £47 was to be restored to her in nine months, should no engagement take place within that time. She repudiated this contract and seeks the return of her money.

Held, that in the case of an illegal contract, one party may withdraw so long as it is executory.

Collins, M. R.

Assuming that the contract was illegal, it has been contended that there has been such part performance of the contract that the plaintiff cannot insist upon having it undone. It is said that this lady comes to the court setting up the fact that she was party to an illegal contract and asking for relief, and that she should not be allowed to do so, for though it is true that in modern times persons have been allowed to resile from illegal contracts, they cannot do so if any part of the illegal purpose has been accomplished. For authority on this point I may refer to the judgment in *Barclay v. Pearson* (1893), 2 Ch. D. 154. The learned judge, after considering several cases, referred to *Hastelow v. Jackson*, 8 B. & C. 221, in these terms: "*Hastelow v. Jackson* was an action in which the plaintiff and one Wilcoxon deposited money in the hands of a stakeholder to abide the event of a boxing match between them, and after the battle the plaintiff demanded the whole sum from the stakeholder and threatened him with an action if he paid it over to Wilcoxon. This he nevertheless did by the direction of the umpire, and it was held that the plaintiff was entitled to recover from him his own stake as money had and received to his use." Mr. Justice Littledale stated the law very clearly and shortly thus: "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done." Upon this ground the common law position of the plaintiff is made good. Equity did not take the view that in the case of a contract of this

particular kind, tainted with illegality, a case for relief could only be considered where there had been a total failure of consideration. As was pointed out by Lord Hardwicke, equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place. In *Tappenden v. Randall* [2 Bos. & P. 467], Heath, J., said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would have necessarily applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs, I think there ought to be a *locus penitentie*, and that a party should not be compelled against his will to adhere to the contract." Where the parties to a contract against public policy, or illegal, are not in *pari delicto*, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. I cite these cases to show that the jurisdiction exercised by the courts of equity was broader than that of the common law courts, and was not bound by the hard and fast rule that if anything had been done in the furtherance of an illegal contract the court would not intervene. It seems to me that, whether this case is regarded from the point of view of the common law or from the broader point of view of the courts of equity, we are entitled to grant the relief asked for, and are not debarred from doing so by reason that the defendant has taken certain steps and incurred some expense towards carrying out his part of the contract.

19. Agreement in Violation of the Law of Another Jurisdiction.

Graves v. Johnson. 156 Mass. 211.

Graves' firm in Massachusetts sold and delivered liquor to Johnson, proprietor of a Maine hotel, with a view to resale by Johnson in Maine in violation of the law of that state. Graves sues for the price.

Held, that a contract to violate the law of another state is illegal and void.

Holmes, J.

Of course it would be possible for an independent state to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition, it is admitted that an

agreement to break the laws of a foreign country would be invalid. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law; he must have known the intention in fact. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act.

Between these two extremes, a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell in violation even of the domestic law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law.

We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. It appears to us not unreasonable to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act.

Chapter II.

OPERATION AND DISCHARGE OF CONTRACTS.

I.

PARTIES TO CONTRACTS.

Ordinarily a contract does not impose liability or confer rights upon persons who are not parties to it. Some courts, however, hold that if a contract is made for the benefit of a third person, he may sue upon it; while all allow a beneficiary to enforce a trust agreement, and all permit a party to recover money properly belonging to him, in the hands of another who has received it in pursuance of a contract made with a third party. A person not originally a party to a contract may sue upon it if it has been assigned to him by act of one of the parties or by operation of law.

Credits in money or goods may almost universally be assigned, but liability upon a contract cannot be assigned, unless

- (1) the other party assents,
- (2) the contract involves work requiring no personal skill or qualifications, or
- (3) the contract relates to an interest in land which itself implies certain liabilities.

No form of assignment is necessary, though the debtor is not bound until he receives notice. As between assignor and assignee, the rights are fixed at the time of the assignment. There is a conflict as to the rights of successive assignees, when the last gives notice first. Most courts hold that a later assignee giving notice to the debtor first is entitled to the credit assigned, but others hold that the first assignee even in these cases is entitled to the property. If the debtor has paid any assignee without notice, he is of course under no liability to an assignee who subsequently notifies him of the assignment. All assignees take subject to equities against their assignors, and are therefore said to stand in the shoes of the assignor. This rule does not apply to negotiable instruments, which are governed by the independent principles of the law mer-

chant. Certain assignments result from the operation of law. An assignment of an interest in land carries with it rights incidental to the transfer of the property; marriage operates to vest rights of courtesy or dower in the land of the spouse; death transfers property, together with some contractual rights and duties, to the executor, administrator, or heirs; and bankruptcy vests title to the bankrupt's estate in his trustee.

Parties to a contract may contract individually; jointly, when several persons on one side agree to do a thing together; severally, when they agree to do it independently; or jointly and severally when they agree to do it both together and independently. In joint contracts, all promisors must, as a general rule, be sued together though each is liable for the full amount of the debt. If one joint promisor dies, actions at law must be brought against the survivors, although in equity the estate of the deceased joint promisor may be joined. If one joint, or joint and several, promisor is released, the effect is to release all. When joint parties are promisees, they are entitled to performance jointly, not severally, and in the case of death of one of them, the rights devolve upon the survivors. In order to bring action upon the contract, they must all join in the suit. If one joint debtor pays the entire debt, he may enforce contribution from the others and recover from each his portion of the debt. When the contracts are several, the parties cannot sue or be sued jointly. Suit must be brought by or against each. When contracts are joint and several, suit may be brought by or against all jointly or by or against each severally: less than all cannot sue or be sued jointly in joint and several contracts.

A. Parties Privy to Contract.

1. Necessity of Privity.

Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.
L. R. (1915) A. C. (Eng.) 847.

The Dunlop Company, Ltd., sues Selfridge & Company, Ltd., for breach of an agreement not to cut the Dunlop Company's list prices. The agreement in question was entered into between Selfridge & Company, Ltd., and Dew & Company, factors, who had a contract with the Dunlop Company to procure such an undertaking from their (Dew & Company's) retail customers. This action is brought by the Dunlop Company to enforce the agreement between Dew & Company and Selfridge & Company, Ltd.

Held, that the plaintiffs were not parties to the contract between

Dew & Company and Selfridge & Company, Ltd., and hence cannot maintain an action on the agreement.

Viscount Haldane, L. C.

In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.

Lord Dunedin:

I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations, I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right.

"An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, as above defined, moving from Dunlop to Selfridge.

In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale; but that agreement for sale is an agreement entirely between Dew and Selfridge. The tires, the property in which upon the bargain is transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop held these tires as proprietor, and not as agent. What then did Dunlop do, or forbear to do, in a question with Selfridge? The answer must be, nothing. He did not do anything, for Dew, having the right of property in the tires, could give a good title to any one he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed.

2. Right to Recover Money Had and Received.

Roberts v. Ely. 113 N. Y. 128.

Geiger & Company bought tea of Ely, which tea was then in the custody of the Chicago and China Tea Company. Geiger & Company made an agreement with the China Tea Company that the tea should be insured for their benefit. The tea was subsequently burned, and the entire insurance money paid to Ely, who paid no portion of it to Geiger & Company. The plaintiff, the assignee of Geiger & Company, seeks an accounting from Ely for this money so paid to Ely's firm.

Held, that when one person has money in his hands properly belonging to another person, that other is entitled to sue without further privity of contract.

Andrews, J.

Assuming that the plaintiff is right in his construction of the facts, the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. The right on the one side, and the correlative duty on the other, create the necessary privity and justify the implication of a promise by the defendant to do that which justice and equity require. It is immaterial, also, whether the original possession of the money by the defendant was rightful or wrongful. It is sufficient that the duty exists on his part, created by the circumstances, to account for and pay it over to the plaintiff.

3. See Cases under Chapter I, III, Consideration.

B. Assignment.

1. In General.

Atlantic & North Carolina Railroad Co. v. Atlantic and North Carolina Co. 147 N. C. 368.

Ives agreed to cut and deliver 15,000 cords of wood to the plaintiff. The plaintiff then leased its property to the Howland Improvement Company, which in turn assigned to the North Carolina Company. The North Carolina Company refused to continue the contract with Ives. Ives recovered judgment against the Railroad Company, which now sues the defendant, the North Carolina Company, for its expenses in that suit on the ground that the defendant agreed to be responsible for its debts. The defense is that the contract with Ives was not assignable and therefore would not pass with the other liabilities.

Held, that a contract involving no personal relation or confidence is assignable, both as to credits and as to liabilities.

Hoke, J.

While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown had an interest, could not be transferred by assignment, the rule in its strictness was soon modified in practical application by the common law courts themselves and more extensively by the decisions of the courts of equity; and the principles established have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of same can be maintained by the assignee in his own name.

The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are in general assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property and from frauds, deceits and other wrongs whereby an estate, real or personal, is injured, diminished or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises

to marry, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill or knowledge of a contracting party.

There is an exception to the effect that executory contracts for personal services involving a personal relation or confidence between the parties cannot be assigned. And another, equally well established and well-nigh as broad as the rule itself, is that executory contracts imposing liabilities or duties which in express terms or by fair intendment from the nature of the liabilities themselves import reliance on the character, skill, business standing or capacity of the parties, cannot be assigned by one without the assent of the other.

It is contended that, by reason of those exceptions stated in the authorities referred to, the contract before us was not assignable so as to impose liability of performance on defendant lessee, but we think the position is not well taken. In the first place, the exception noted arises for the protection of the other party, and if such party assents, as he did in this instance, the restriction no longer exists. But, apart from this, it will be noted that the exception referred to does not arise or apply when the contract is entirely objective in its nature, and gives clear indication that the personality of the other contracting party was in no way considered.

The contract in question was assignable. It was an ordinary business contract for the delivery of so much cord wood on the lessee's right of way, not requiring or importing any special reliance on Ives' skill or business qualifications. It could be performed as well by one man as another. As a matter of fact, there is testimony to the effect that it was to be done in this instance by convicts and that quarters had already been constructed for their protection and accommodation while doing the work. It was a contract of employment in the sense that it was to be performed by means of personal labor, but not in the sense that it was expected or intended that it should be performed by Ives. Nor did the credit or business responsibility of the original parties affect the matter one way or the other; not that of Ives, for the wood was not to be paid for till it was delivered, and so the defendant assignee was fully protected; nor that of the assignor, for unless Ives had agreed to accept the defendant's responsibility in stead and place of the assignor, making it a new contract by way of novation, the assignor would, notwithstanding the assignment, still remain liable.

This, ordinarily, is all the books mean when they state the proposition in general terms that a contract imposing liability cannot be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility. It may be well to note that we are speaking of the assignment of the contract and not of the transfer of the property about which parties may have contracted. In the last case it is a generally accepted doctrine that, in the absence of an agreement, express or implied, a party who buys property from a vendee to whom the owner has contracted to sell it, does not, as a

rule, come under personal obligation to the owner to pay the purchase price.

2. Assignment of Rights Not Yet in Existence.

Taylor v. Barton Child Co. 228 Mass. 126.

The Barton Child Company assigned its book accounts due and which should become due to McCarthy, who in turn assigned to the plaintiff. This bill is brought to enforce the pledge and transfer of the book accounts, against the trustee in bankruptcy of the Barton Child Company.

Held, that there can in general be no assignment of things not yet in being.

Rugg, C. J.

The crucial question is whether the assignment of book accounts, which are to come into existence in the future in connection with an established business, will be enforced in equity against a trustee in bankruptcy.

It is a well recognized principle of the common law that a man cannot sell or mortgage property which he does not possess and to which he has no title. The vendor must have a vested right in personal property in order to be able to make a sale of it. "A man cannot grant or charge that which he hath not."

There can be no present conveyance or transfer of property not in existence, or of property not in the possession of the seller to which he has no title. A sale of personal chattels is not good against creditors unless there has been a delivery. Manifestly there can be no delivery of chattels not in existence. In order that after acquired chattels may be brought under the lien of a mortgage, or of hypothecation, there must be some act of the parties subsequent to the time when such chattels come into existence and into the ownership and possession of the mortgagor. The mortgage is held not to have the effect of changing the title to after acquired chattels without some further act of the parties.

There is an exception at the common law to the effect that one may sell that in which he has a potential title although not present actual possession. The present owner might sell the wool to be grown upon his flock, the crop to be harvested from his field or the young to be born of his herd, or assign the wages to be earned under existing employment. That principle of the common law has never been carried so far as to include the case at bar. The catch of fish expected to be made upon a voyage about to begin cannot be sold. There can be no sale of the wool of the sheep, the crop of a field, or the increase of herds not owned but to be bought, and there can be no assignment of wages to be earned under a contract of employment to be made in the future.

It is also the established doctrine in this Commonwealth that a mortgage of future acquired property will not be enforced in equity before actual possession taken by the mortgagee as against persons subsequently acquiring an interest therein for value and having possession. That has long been settled here, although the contrary rule prevails more widely. It would be anomalous for a court governed by these principles as to sales and mortgages of future acquired goods and chattels to hold that there could be an assignment of future acquired book accounts valid and enforceable under circumstances where a like attempt to hypothecate future acquired chattels would be held unenforceable.

Practical difficulties of no small consequence would be encountered in the operation of the contrary doctrine. Assignments of book accounts do not require recording or any public act for their validity. Notice need not be given in order that they be valid against third persons. Merchants and manufacturers well might acquire a considerable credit upon the supposed strength of book accounts which later might turn out to have been assigned long before they came into existence. A door would be opened for the accomplishment of fraud in business.

There are decisions by the courts of other jurisdictions where a contrary result has been reached.

The principles and spirit of our jurisprudence have been that owners of personal property ought not to acquire any false credit by creating incumbrances more or less secret and unknown to the world upon property of which they are to come into possession in the future as ostensible owners in absolute right.

In the light of these decisions it would be illogical and discordant with the policy of our law to uphold the assignment in the case at bar.

3. Assignment of Future Wages.

Rodijkeit v. Andrews. 74 Oh. St. 104.

Rodijkeit assigned his wages to become due from the L. S. & M. S. Railroad to Andrews for a valuable consideration. Rodijkeit now sues the railroad for his wages, in spite of the previous assignment.

Held, that an assignment of future wages is valid if they are to be earned under an existing employment.

Summers, J.

The question presented is the right of a person in the employ of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment.

It is well settled that a mere expectancy or possibility is not assignable at law; consequently wages to be earned in the future, not under an existing engagement but under engagements subsequently

to be made, are not assignable. If there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned, then the possibility is coupled with an interest and the wages may be assigned.

Some of the early cases were to the effect that the engagement must be for a time covering the wages assigned. And later cases held that the assignment was valid although the engagement was subject to be terminated at any time.

But in *Kane v. Clough*, 36 Mich. 436, Cooley, C. J., states that he is unable to distinguish a case of existing employment merely, where there is no contract for a definite time, but only an employment, and an expectation of continuous work, from a case of an existing contract for a fixed time but subject to the right to discharge at will, and, accordingly, it is there ruled that an assignment of wages to be earned in the future under an existing employment is valid.

"An assignment of his wages by a laborer, executed when he is not engaged in, and not under contract for, the employment in which the wages are to be earned, is too vague and uncertain to be sustained as a valid assignment and transfer of property." But "an assignment of wages expected to be earned in the future in a specified employment, though not under an existing employment or contract, is valid in equity." The reason such an assignment is not good at law but may be in equity is tersely stated thus: "To make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only."

4. Assignment of Contract Involving Personal Credit.

Arkansas Valley Smelting Co. v. Belden Mining Co. 127 U. S. 379.

The Belden Mining Company made a contract in writing with Billing and Eilers to deliver lead ore to Billing and Eilers, payment to be made in accordance with an assay to be taken. The firm of Billing & Eilers was dissolved and the contract assigned to Billing who in turn assigned the contract to the Arkansas Valley Smelting Company, the plaintiff. The Belden Company thereupon refused to perform the contract.

Held, that when a contract involves personal credit, it is not assignable.

Gray, J.

At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the

terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable.

But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

The contract here sued on was one by which the defendant agreed to deliver ten thousand tons of lead ore from its mines to Billing and Eilers at their smelting works. The price was not fixed by the contract, or payable upon the delivery of the ore. During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment except in the character and solvency of Billing and Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The cases tending to support this action are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property. Nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in

which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only.

5. Assignment of Part of Debt Due.

James v. City of Newton. 142 Mass. 366.

Stewart entered into a written contract with the city of Newton to build a school house. He made an assignment to the plaintiff of \$600 of the money to become due to him from the city, to be paid out of the money reserved by the city on the guaranty of performance. Gilkey was appointed assignee in insolvency of Stewart's property, and the question now arises whether the assignment of part of the amount due is valid.

Held, that in equity an assignment of part of a credit may be made although the rule is different at law.

Field, J.

Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor under an implied power which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment.

In many jurisdictions, courts of equity have gone further, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still further, and have held that after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that

this is no defense to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

6. Form of Assignment.

Moore v. Lowrey. 25 Ia. 336.

Miles & Keeler owed money to Fowler & Munson. They requested Lowrey to pay a balance due them to Fowler & Munson, or order, intending thereby to transfer and assign the claim against Lowrey to Fowler and Munson. The plaintiff, a creditor of Miles & Keeler, seeks to have this assignment set aside on the ground that its form was improper.

Held, that no particular form is necessary to constitute an assignment.

Beck, J.

No particular form is necessary to constitute an assignment of a debt. If the intent of the parties to effect an assignment be clearly established, that is sufficient. Neither is it necessary that the assignment be in writing. If in writing, it may be in the form of an agreement, an order, or of any other instrument which the parties may use for that purpose. Neither is it necessary that the intent and the contract of the parties fully appear in the writing, but they may be otherwise shown.

It is objected, that the order is negotiable, and was not taken by the intervenors in payment *pro tanto* of their claims upon Miles & Keeler. These facts may be admitted, yet it does not follow that the assignment is thereby defeated. If the assignment of the debt was made in good faith, and the order given for the purpose of effectuating its collection, the negotiability of the order certainly could not defeat the assignment.

7. Rights of Assignee after Notice to Debtor.

Brice v. Bannister. L. R. 3 Q.B.D. (Eng.) 569.

Gough, who had agreed to build a ship for Bannister, assigned £100 of the money to become due, to Brice. Brice gave notice of the assignment to Bannister. Subsequently Bannister paid Gough all the money due under the contract. Brice sues for the amount assigned to him.

Held, that after notice of assignment, the rights of the assignee cannot be divested by the assignor and debtor.

Cotton, L. J.

It was urged that the assignee of a chose in action takes subject to all equities. But these must be equities existing or arising out of circumstances existing before notice is given of the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the date of the notice to the defendant of the assignment to the plaintiff. The plaintiff was assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other costs of construction. The defendant, for his own purposes, determined not to complete the ship himself, but to let Gough do so under the contract. To enable him to do so, he, after notice of the assignment to the plaintiff, paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right.

Bramwell, L. J.

If Gough had broken his engagement, or threatened to break his engagement to finish the vessel, or to finish it in a reasonable time, and the defendant to remedy and avert such breach, reasonably and bona fide, not to defeat the plaintiff but to protect himself, advanced money to Gough before it was done, so that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But the defendant's advancing of the money as he did was quite voluntary and in no sense compulsory.

8. Assignee Takes Subject to Equities against Assignor.

The Goshen National Bank v. Bingham. 118 N. Y. 349.

Brown fraudulently secured the certification by the Goshen Bank of his personal check, and in exchange for this check, which he neglected to indorse, procured a check from Bingham & Co. which he cashed. He then left for Canada. Bingham & Co. subsequently got from Brown a power of attorney to indorse the certified check which they had received from him, and sue to recover the amount from the bank.

Held, that the transfer of an unindorsed negotiable instrument is like any other assignment; the assignee is bound by equities against the assignor.

Parker, J.

As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a bona fide holder to whom the check had been indorsed for value. By

an oversight on the part of both Brown and Bingham & Co., the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud which constituted a defense for the bank as against Brown.

It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities and defenses.

The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law merchant, as to negotiable instruments. It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement, for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses which would have rendered them unavailable in the hands of a prior holder.

This rule is only applicable to negotiable instruments which are negotiated according to the law merchant.

When, as in this case, such an instrument is transferred but without an indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing in favor of the maker or acceptor against the previous holder.

Prior to the indorsement of this check, therefore, Bingham & Co. were subject to the defense existing in favor of the bank as against Brown, the payee.

It would seem, therefore, that having taken title by assignment, for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well, Brown and Bingham & Co. could not, by any subsequent agreement or act, so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank. The subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party.

9. Rights of Successive Assignees.

Phillips's Estate. No. 3. 205 Pa. 515.

Moses assigned his interest in the Phillips estate to four persons for varied amounts, the aggregate of which exceeded his

interest. The Life Insurance Company, one of the assignees, claims priority over other assignees, although third in point of date, because it first gave notice of the assignment.

Held, that in Pennsylvania, as between successive assignees the one first giving notice is entitled to the property assigned.

How far, as between successive assignees of a fund in the hands of a third person, notice of the assignment to such person is necessary to complete the title of the assignee as against a subsequent assignee having no actual knowledge of the prior assignment, who gives such notice, does not appear to have been decided in Pennsylvania, though it has been held that an assignment is good without notice, as against a subsequent attachment. But an attaching creditor stands precisely in the position of the assignor, with only such rights as he has against his assignee; while the rights of a subsequent purchaser for value depend upon entirely different considerations. In England and in many of the states of the union it is perfectly well settled that the title of an assignee does not become complete until he has given notice, and the rule is that the assignees have priority according to the priority of notice. A different doctrine, it appears, however, is held in some of the states, where, between different assignees of a chose in action, he who is first in time is first in right, notwithstanding he has given no notice to the debtor or the subsequent assignee, though the debtor will be protected if he has made payment to the assignor or to the second assignee before notice of the prior assignment.

"The American decisions upon this subject cannot be reconciled. In England and in some of the states the rule giving to the assignee who first notifies the debtor party or trustee a precedence over all others, even those who are earlier in date, furnishes a certain and simple criterion for determining the priority, it being remembered that this rule is confined to pure personal things in action, and does not extend to liens and other equitable interests in real estate. In the states where the rule referred to does not prevail, the question must turn upon other doctrines. If the interests are equitable in their nature, and the equity of the assignee is intrinsically superior to the others, the settled principles of equity should control, that the order of time determines the order of priority; or in other words, that the subsequent assignee takes subject to the rights of the one prior in time; and this principle has been applied in such cases by many able decisions. On the other hand, if the subsequent assignee has acquired the legal title, and was a purchaser for a valuable consideration and without notice, he is protected, and this doctrine of bona fide purchase seems to have been extended, by some decisions, to subsequent assignees who had only obtained an equitable interest."

The analogies with regard to sales of personal property in possession are certainly in favor of the view taken in the decisions last referred to, the vendee, in such case, being required, for the protection of subsequent purchasers, to take possession to the exclusion of the

vendor where the property is capable of actual possession, or by assuming such open ownership as the case admits of, where it is not. Why should a different rule apply to purchases of choses in action? Why should the purchaser not be required to do all that lies in his power to make it impossible for the assignor to commit a fraud or to do an injury to subsequent purchasers, relying on his integrity and having no means of knowing that he has ceased to be the owner except by inquiry of the person in whose hands the fund is? The failure to give notice to such person puts it in the power of the assignor to do this wrong, and the consequences of the failure ought, therefore, to be upon him who commits it.

(The foregoing excerpt is taken from the opinion of the District Court, whose judgment was affirmed on appeal.)

10. Assignment by Death.

Billings's Appeal. 106 Pa. 558.

Billings made a written contract with Colton whereby Colton was to cut pine timber from land of Billings. Colton then contracted with Putnam that Putnam should do part of the work. Billings and Colton both died and the question is raised in the administration of the Billings estate whether the contract in reference to the cutting of the timber was thereby terminated.

Held, that a contract which does not involve personal service may be enforced by or against an executor or administrator.

Clark, J.

The plaintiffs maintain that the contract under which the defendants assume to act is personal in its character; that it provides for the performance of such services, and the exercise of such personal skill and experience upon the part of Colton, in the matters involved, as necessarily limited its performance to Colton himself; and, further, that the contract is such that at the death of Billings, its continuance devolved such duties and created such obligations upon his legal representatives as are inconsistent with the settlement of his estate; that, therefore, the survival of the contract was necessarily not in contemplation of the parties at the time of its execution. It is urged, therefore, that upon the death of either party, the obligation of the contract ceased as to both.

It is certainly true that the rights and responsibilities of executors and administrators depend, in many cases, upon the relations of the original parties; the former do not, in all cases, succeed to the contracts of the latter; what may be termed mere contract, personal relations do not survive. Where the agreement is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or more generally, where distinctly personal considerations are at the founda-

tion of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. The *casus* must be such, however, as to wholly prevent the performance of the contract; what is impossible to be done cannot be required to be done, and a subsequent intervening incapacity will, in such case, work a dissolution of the contract.

But where a party agrees to do that which does not necessarily require him to perform in person (that which he may, by assignment of his contract or otherwise, employ others to do), we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true, also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so inconsistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed to have intended its dissolution at death. The whole question in each case is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general. Resorting in the first instance to the instrument itself, we find there an express provision that for the faithful performance of each and every the covenants and agreements aforesaid, each of said parties doth bind himself, his heirs, executors and administrators, to the other, his heirs, executors and administrators, firmly by these presents.

We discover nothing in the nature of the obligation assumed, or of the duties to be performed on either side that would tend to create any merely personal relation between the parties, or involve such a performance as would indicate that a survival of the contract was not in contemplation; a contrary intention, however, is distinctly shown by the subsequent conduct of the parties.

11. Assignment by Bankruptcy.

In re Wright. 157 Fed. 544.

Wright, a bankrupt, was entitled to commissions upon renewal premiums on insurance policies. A creditor applied for an order to have this interest assigned to the trustee in bankruptcy.

Held, that under the bankruptcy act, this was property of the bankrupt which he might have transferred and which, therefore, passes to his trustee.

Noyes, Cir. J.

Section 70 of the bankrupt act (Act July 1, 1898, c. 541) provides that the trustee shall be vested with "the title of the bankrupt, as of the date he was adjudged a bankrupt, except so far as it is property which is exempt."

It may be conceded that this contract as a whole is based upon

personal trust and confidence, and is not assignable. But there is a difference between an absolute assignment of a contract and an assignment of rights under a contract. The personal confidence which precludes the transfer of rights arising out of a contract must be involved in the nature of the rights themselves. It is not ordinarily involved in the right to receive moneys due or to grow due under a contract, and this right is generally assignable without the consent of the other party. The right to receive the renewal commissions under the present contract, which is the right involved in the question certified, seems not to involve personal confidence. The contracts of insurance have already been obtained. The collection of renewal premiums is largely a ministerial act. It is possible that, if the interests under the contract are transferred to the trustee, the insurance company may defeat the object of the transfer by withholding its consent. But the fact that the interest is defeasible does not prevent its transfer. Defeasible and contingent interests of this nature are assignable.

C. Joint and Several Contracts.

1. Intent to Make Joint or Several Contract.

Keightley v. Watson. 3 *Ex. Rep. (Eng.)* 716.

Dobbs, Keightley and R. and H. Watson entered into an agreement under seal whereby Dobbs agreed to buy certain land from Keightley, and resell it to the Watsons and another. The Watsons made separate covenants with Dobbs and with Keightley that they would pay the remainder of the purchase money, if any was due. Upon a suit by Keightley against the Watsons for the remainder of the purchase price, it was insisted that this was a joint contract and that Dobbs should have been made a party to it.

Held, that a contract is to be construed as a joint, or as a several, contract according to the expressed intent of the parties.

Pollock, C. B.

The inquiry really is as to the true meaning of the covenant, at the same time bearing in mind the rule—a rule which I am by no means willing to break in upon—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construc-

tion. What, then, in this case, did the parties mean? The words of the covenant are, "And the said R. Watson, H. Watson, . . . for themselves, their heirs, executors, administrators, hereby covenant with the said W. T. Keightley, his executors, administrators, and assigns, and as a separate covenant with the said A. A. Dobbs, his executors, administrators, and assigns, that they" will do so and so. If I am to put a construction upon that, I should say that it is intended to be a several or separate covenant. The words of this instrument are several, and its terms disclose a several interest; the covenant, therefore, must be construed according to the words as a several covenant, and it appears to me that the words used by the parties were intended to create such a covenant. I think, therefore, that the plaintiff is entitled to sue alone.

2. Suit against Joint Contractors.

State of Maine v. Chandler. 79 Me. 172.

The state sues the defendants as sureties on a joint and several bail bond of one Condon, who was indicted. They insist that Condon should have been made a party to the suit.

Held, that joint and several contractors must be sued either together or each severally.

Foster, J.

It is elementary law that where three or more parties contract jointly and severally, all are to be sued in one action, or each may be sued severally. It is improper, as all the authorities hold, to join two and omit the others, for in such case they are sued neither jointly nor severally, as they promised. And in case the plaintiff does not see fit to proceed against them severally, it is the undoubted right of the defendants to have all their joint promisors or obligors joined with them in the suit.

This action, then, must stand or fall like any other founded upon contract. It is brought against two only of the three parties who jointly and severally recognized to the state—now plaintiff in this suit. It is not brought against them in accordance with their obligation entered into by them. They are sued neither jointly nor severally. There are too many joined as defendants to correspond with their several obligation—too few to correspond with it as joint. This being so, the misjoinder in the one case, or the non-joinder in the other, as we have said, is good ground of demurrer, since the fact appears upon the face of the plaintiff's declaration that there was a joint and several obligation entered into by three, all of whom are known as well to the plaintiff as to the defendants in this suit.

It makes no difference that one of the recognizers was the principal in the criminal process, and the other two were his sureties. The recognizance itself determines the liability of the parties, and,

as appears from the record, that liability was joint and several in relation to the three parties who became bound by it. It was not a joint and several undertaking on the part of the sureties only; and the plaintiff cannot by its pleading change their liability from that which they assumed.

3. Suits on Joint Contracts When Some of the Joint Contractors are Outside the Jurisdiction.

Rand v. Nutter. 56 Me. 339.

Rand sued G. H. Chadwick, W. F. Chadwick and Nutter jointly on a joint debt. Nutter was the only one within the jurisdiction of the state and Rand discontinued suit against the others.

Held, that when some of the joint contractors are outside the jurisdiction, the action may be brought against the rest.

Appleton, C. J.

The rule of the common law is well established that, in case of joint and several liability, the suit may be joint or several. But when the claim is joint, the action must be against all who are jointly liable. If a suit is brought against one, the non-joinder of the others may be pleaded in abatement, but if not so pleaded, the judgment thus obtained may be pleaded in bar to a suit brought against the others. Thus, if two are jointly liable upon a note or other joint liability, a judgment against one is a bar to a suit against the other, the cause of action being merged in the judgment thus obtained. To this rule there are exceptions.

In joint actions, there may be a severance by operation of law, as by bankruptcy, infancy, etc.; in such case, the plaintiff may proceed without joining those having special discharge. So, where there are several defendants sued on a joint demand, and some are without the jurisdiction and having no property within the same, the plaintiff may cause his writ to be served on those within the state, and proceed against them for a breach of the contract. If one of two joint promisors have neither domicile nor property in this state, a separate action may be maintained against the other. Neither is a judgment in another state against one of two joint promisors, without satisfaction, a bar to an action in this state against the other upon the joint contract. When one of two joint contractors is without the state, as appears by the officer's return, so that no service can be made upon him, judgment may be rendered against such of the joint contractors as are found within the jurisdiction, and such judgment, remaining unsatisfied, is no bar to a subsequent suit and judgment against the remaining signer or signers.

4. Release of One Joint Debtor.

In re E. W. A., a Debtor. (1901) 2 K. B. (Eng.) 642.

A bank obtained a joint and several judgment against the debtor and B., and presented a petition in bankruptcy against B. That petition was withdrawn upon terms embodied in a receipt in full discharge of all guaranties, given to B. by the bank for £3000. The bank then presented a petition against the debtor for the alleged balance.

Held, that a receipt, amounting to an accord and satisfaction, equivalent to a release of one of two joint and several debtors, will release both.

Collins, L. J.

The debt upon which the petition was founded in this case is a debt on a joint and several judgment which was given in respect of the joint and several liability of the debtor under a guarantee; and the ground of the appeal is that the liability of the debtor has been released by reason of the fact that a release had been given to his joint debtor.

After that arrangement was made with B, these proceedings in bankruptcy were commenced against the present debtor, and his answer to them is that this document, when properly considered, amounts to an accord and satisfaction which is equivalent to a release of the joint debt which was the foundation of the judgment, and is, therefore, a satisfaction of his liability under the judgment. The question really turns on this, whether or not this document has the effect of accord and satisfaction in getting rid of the joint and several liability of B under the judgment. If it has that effect, it is not disputed that the rule of law applies, namely, that the release of one of two joint debtors has the effect of releasing the other.

It is clear that, although a document in terms purports to release one of two joint debtors, yet it may contain in terms a reservation of rights against the other joint debtor. Where you find those two provisions you construe the document, not as a release, but merely as an undertaking not to sue a particular individual, and the result is that the right to proceed against the co-debtor is reserved and can be put in force against him. Whenever you can find from the terms of the document an agreement for the reservation of rights against the co-debtor, then, I agree, the document cannot be construed as an accord and satisfaction of the joint debt, and, therefore, as a release of the co-debtor. But it appears to me that, on the face of this document, there is no intention shown so to limit its effect, and that it is framed in the widest possible terms so as to cover, not only this particular debt, but all other claims by the bank in connection with the Professional and Trades Papers, Limited, for it is admitted that the

foundation of the judgment was the guarantee, and at the time this document was drawn up there was this joint liability on the judgment to the extent of £6000. And there is this circumstance to be observed, that this document expressly states that the cash and bills are accepted "in full discharge of all claims by the Capital and Counties Bank, Limited, against Mr. B—— in connection with the Professional and Trades Papers, Limited." Now, having regard to the fact that the fundamental claim against B was the judgment for £6000, it is impossible to say that this judgment is not one of the "claims" within the words I have read.

The person giving it may not realize the full legal consequences of it as regards the release of the co-debtor; but that is not, in my opinion, a sufficient ground for reading into the document something that is not expressed in it; and unless you find in it something qualifying the general words, it appears to me that the legal consequences of the general words of discharge must follow, notwithstanding that those consequences may go beyond what the person giving the document would have intended if they had been pointed out to him at the time, and if he had had an opportunity of addressing his mind to them.

5. Suit by Joint Contractors.

Capen v. Barrows. 1 Gray (Mass.) 376.

Capen, Clapp, and Barrows formed a partnership, agreeing to give their whole time and attention to the business. This Barrows did not do, and Capen sues him at law without joining Clapp.

Held, that one of several joint contractors cannot sue separately. (The action could not be maintained for the further reason that suits between partners must as a general rule be brought in equity.)

Metcalf, J.

The defendant's covenants, declared on in this case, were made with the plaintiff and Clapp jointly and not severally, and therefore if an action at law can be maintained on those covenants, it must be an action by the plaintiff and Clapp. It is a settled rule of construction, that when the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may, in its terms, be several, or joint and several. "1. Where the covenant is in its terms several, but the interest of the covenantees is joint, they must join in suing upon the covenant. 2. Where the covenant is in its terms expressly and positively joint, the covenantees must join in an action upon the covenant, although as between themselves their interest is several. 3. Where the language of the covenant is capable of being so construed, it shall be taken to be joint or several, according to the interest of the covenantees."

The present case comes within the third of the foregoing rules. The covenants in suit, not being in terms either joint or several, are capable of being construed according to the interest of the covenantees. And their interest, legal and beneficial, is clearly joint and not several. They were co-partners, and the interest of each is the same in kind and amount, and each is equally injured by a breach of those covenants. And the defendant ought not to be held liable to two actions for the same breach.

6. Right of Joint Contractor to Contribution from the Others.

Putnam v. Misochi. 189 Mass. 421.

Putnam, a stockholder of a Maine corporation, who had been forced to pay judgment creditors of the corporation to the amount of his unpaid subscription, seeks to recover from Misochi and others, also stockholders whose subscriptions were not fully paid, their proportionate share of such payments.

Held, that a person jointly liable with others for a debt which he alone is forced to pay, is entitled to contribution from the others.

Knowlton, C. J.

It is a familiar principle that, when several parties are equally liable for the same debt and one is compelled to pay the whole of it, he may have contribution against the others to obtain from them the payment of their respective shares. This right to contribution is not founded upon contract, but upon a principle of natural equity and justice. "The doctrine of contribution rests on the principle that when the parties stand in *equali jure*, the law requires equality which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is founded, not on contract, but on the principle that equality of burden as to common right, is equity. And the obligation to contribute arises from the nature of the relation between the parties." The principle has long been applied to the liability of stockholders in corporations for the corporate debts. "A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders. The rule, however, is well settled that a stockholder who has been compelled to pay more than his proportion of the debts of the company may maintain an action against his co-stockholders for contribution." The neglect of a subscriber for stock to pay for it in full is not a tort, which deprives him of his right to contribution; but it leaves him in the position of a surety, who is liable for a debt equally with other sureties. This is recognized in the numerous suits for contribution by stockholders which are sustained by the courts.

The fact that the plaintiff, after satisfying the judgment, made no demand upon the corporation and took no action against it, under the Revised Statutes of Maine, does not affect his right to contribution.

The contribution should be decreed against the solvent defendants who are within this jurisdiction.

II.

CONSTRUCTION OF CONTRACTS.

Contracts are to be interpreted by the following rules:

1. The contract will be given that meaning which makes it valid, rather than invalid, and reasonable rather than unreasonable. The meaning of general words will be restricted to the parts of the contract to which they are intended to apply. Obvious mistakes of writing or grammar, including punctuation, will be corrected.

2. Words are to be understood in their plain and literal meaning, though technical words are to be given their technical construction. Words are construed most strongly against the party who has used them. When there is a confliction between printed and written words, the latter control.

3. Usage may vary the usual meaning of words. In order that it shall affect a contract, it must have existed at the time the contract was made; be general, definite, reasonable, and not oppressive; and not inconsistent with any rule of law or with the terms of the contract.

4. If the meaning of the contract is doubtful, the construction given by the parties is of weight in determining the true meaning. Terms obviously intended to be included in the contract may be read into it, and the law will itself imply necessary terms which have been omitted through oversight.

When no time for performance is fixed, the contract is considered to intend a reasonable time. Time itself is generally not of the essence of the contract, unless it appears that such is the intention of the parties. From this, it ordinarily follows that a party in default on account of time may sue upon the contract, and only such damages as proximately result from his failure to complete the contract within the time specified will be deducted. The parties may, however, make time a condition of the contract. Equity is somewhat more liberal in regard to stipulations as to time than are the courts of law.

Terms of a contract to be performed by the respective parties may be independent of each other or they may each be dependent

upon the performance of the other. Terms are construed to be independent if an absolute promise is given in return for another equally absolute promise. When a contract is divisible, a breach of one promise will not discharge the whole contract but will warrant damages only to the extent of that breach. Failure to perform a subsidiary promise, whether independent or dependent, will not discharge the contract unless it is vital to the obligation. Dependent terms, generally conditions of the contract, are classified as conditions precedent, concurrent, and subsequent. A condition precedent is a term which must be performed by one party before there is any obligation of performance on the other; a condition concurrent, generally impossible except in contemplation of law, is similar to a condition precedent and must be performed concurrently with performance by the other party; a condition subsequent is a condition which operates to discharge an existing obligation of performance upon the occurrence of circumstances contemplated by the contract.

A. Legal Effect of Language.

1. Intent of Parties.

Hawes v. Smith. 12 Me. 429.

Smith went bail for Nealley, who had been arrested on civil process by Hawes and Lyon. He agreed in consideration of the release of Nealley to pay "all sums of money as may now be due and owing from the said Nealley, whether on note or account." Hawes contends that this included notes made but not yet payable.

Held, that contracts are to be interpreted according to the intent of the parties.

Parris, J.

If such was the understanding of the parties, if they made such a contract, they are to be held to it. It is our business to enforce, not to make, contracts for parties. But it is not for us to enforce as an agreement what the parties never assented to.

It is admitted that the language of the promise, according to its strict legal import, might embrace all that is contended for by the plaintiff. But cases often arise where the meaning of language is to be accommodated to the situation and circumstances of the parties using it. Nothing can be more equitable than that the situation of the parties, the subject matter of their transactions and the whole language of their instruments should have operation in settling the legal effect of their contract;—and it would be a disgrace to any system of jurisprudence to permit one party to catch

another, contrary to the spirit of their contract, by a form of words which perhaps neither party understood.

The maxims for the exposition of contracts are simple and consistent, and well calculated to effect their sole object; namely, to do justice between the parties by enforcing a performance of their agreement, according to the sense in which they mutually understood it at the time it was made;—and all latitude of construction must submit to this restriction, that the words and language of the instrument bear the sense intended to be put upon them.

The plain, ordinary and popular sense or meaning of the terms adopted by the parties shall prevail. It never was a rule of construction that the words in a contract were to be taken in their technical sense, but according to their proper and most known signification, that which is most in use. The necessary use of particular technical expression is chiefly regarded in the sense of law terms. The rules laid down in respect to the construction of contracts are founded in law, reason and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention.

In the construction of agreements the intention of the parties is principally to be attended to.

We can have no doubt from the situation, circumstances and objects of the parties, as they are developed in their written agreement, that the phraseology, "all such sums of money as may now be due and owing, whether on note or account," was supposed and intended to mean and include only such as were then payable, and for the recovery of which Neally had been arrested, and this, no doubt, would be considered the popular meaning of such language, although we admit that the strict technical or legal significance of the terms may be different.

2. Correction of Obvious Mistakes.

Sisson v. Donnelly. 36 N. J. L. 432.

Peters gave a deed to Harrison without inserting the word "heirs" in the deed, the legal effect of which omission was that Harrison received only a life estate. A second instrument under seal was prepared between Peters as party of the first part, Harrison as party of the second part, and Burden as party of the third part, which recited that Peters had previously mortgaged the premises to Burden giving him by mistake only a life estate, and that Peters and Harrison agreed that Burden should take a fee simple. The lower court held that this deed was sufficient to vest the fee in Harrison without recourse to the previous deed, as it ran to "the party of the second part," instead of to "the party of the third part," as was intended. The plaintiff, Sisson, had a

deed from Peters' heir conveying full ownership to him, and brings this suit to establish his title.

Held, that obvious mistakes in a written instrument may be corrected.

Beasley, C. J.

The intention of the parties is clear on the face of the conveyance, the only question being whether or not the deed can be read so as to effectuate such intention.

The rule of construction, which is universal and is applicable to conveyances as well as to all other kinds of deeds is that it "be favorable and as near the minds and apparent intents of the parties as it possibly may be, and the law will permit." This has ever since and in a great multitude of cases, been recognized as the leading canon in giving effect to every variety of written instruments. "The primary object of inquiry is the intention of the parties, and where that is on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

It will be observed that by the limitations of the rule itself, the intention is to be enforced whenever "the law will permit." I take that to mean that the intention will prevail whenever such intention is unmistakably manifested, having regard to all parts of the instrument, unless the law requires the use of technical terms to effectuate such intention, or unless such intent is contrary to legal rules. The first of these classes of cases is aptly exemplified by the imperfect form of the deed to which I first called attention. It created but a life estate, and it was insisted that the intention was to create a fee; but such intention could not have been carried into effect, no matter how plainly apparent, because the law requires the use of certain terms of art in the creation of a fee simple. So, as an illustration of the second branch of the exception, "If one give land to another and his heirs for twenty years, in that case the executor, and not the heir, shall have that land after the death of him to whom it is given." But, unless in these instances, where artificial terms are requisite, or an attempt is made to do something inconsistent with established principles, I am not aware of any exception to the rule that the intention of the party must prevail. There appears to be nothing technical in legal regulations respecting the description of the parties to written instruments. Unless a misdescription in this particular renders a deed uncertain as to its meaning, such defect is of no consequence. A plain misnomer can do no hurt, the only question being whether it is clear who is intended. It has been decided that a mistake in the christian name is immaterial, if the deed explains who is intended. "A deed, to Robert, Bishop of E., will be good, though his real name is Roland."

So where a deed purported to be that of a married woman, her name only appearing as grantor, but it was signed by her and her husband, it was held to be good as a grant of the husband as well as the wife. And an omission by an evident mistake of the name of the grantor in a deed of bargain and sale, was supplied by intentment, "and the court was of opinion that this deed passes the freehold, because such was the intention of it." I think it is not reasonably to be denied, that if the name of a party which has been altogether omitted in the operative part of a deed can be inserted, when read by the court, on the ground that the meaning of the instrument to that effect is clear, from the same consideration, the erroneous designation of the grantee may be rectified. In my opinion, the deed under consideration is to be read as though the grantee was described according to what parties plainly meant, as the party of the third part. Under this construction, no title to the premises in dispute ever came to the defendants by the operation of this tripartite deed.

3. Effect of General Words.

Vaughan v. Porter. 16 Vt. 267.

Vaughan sold Porter a patent for making "Vaughan's Patent Balance" under an agreement that "if there should be any defect in said patent, whereby all its privileges cannot be enforced, or if there should be any other defect whatever," the contract should be void. In a suit by Vaughan for the price, Porter contends that the balance was likely to get out of order and therefore within the expression, "other defect."

Held, that the effect of general expressions is to be restricted to that part of the contract to which they are intended to apply.

Redfield, J.

Now it is obvious, we think, for two reasons, that the condition of the contract had reference to no such defects as those alluded to in the requests.

1. It is hardly supposable that the general expression, "or if there should be any other defect whatever," could have been intended to include all possible defects in the machine. That would be to stipulate that the machine should be perfect, which is impossible; and such a stipulation would render the contract void on its face, which would be absurd. If, then, it does not extend to all defects, to what defects does it extend? This brings us to the second reason.

2. That this general expression must be confined to the same class of defects before enumerated. The expression, any other defect, presupposes that some defects had been already enumerated, and that this sweeping expression had reference to the same class of

defects. The other defects, by reference to the contract, were all defects in the patent, and not in the machine. This expression, then, clearly was intended to include all possible defects in the patent, and nothing more.

4. Technical Words.

Collender v. Dinsmore. 55 N. Y. 200.

Phelan & Collender shipped merchandise to Nova Scotia by the Adams Express Company, of which Dinsmore was president, and took a receipt which specified "C.O.D. \$375, from Turner's Express, Boston, Mass." The Adams Express Company did not collect the \$375 from Turner's Express Company and the plaintiffs sue for its failure to do so. The defendants contend that the contract meant simply that the goods were to be delivered to Turner's Express Company which should collect the amount.

Held, that technical words are to be construed according to their technical meaning.

Allen, J.

The rule is that words, or forms of expression which are not of universal use, but are purely local or technical, may be explained by parol evidence, and the same is true of words or phrases having two meanings, one common and universal, and the other peculiar, technical or local. In such case parol evidence may be given of facts tending to show in which sense the words were used. Where characters, marks or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract.

To the usual symbolical direction ordinarily accompanying merchandise by express, subject to charges, are [added] the words, "from Turner's Express, Boston," so that it reads "Collect on delivery \$375 from Turner's Express, Boston." The direction is a very plain and direct one to collect \$375 from Turner's Express, and can only be read as a direction to collect from that company, on delivery of the goods to it, the sum mentioned; and it can only receive another or different interpretation by a change in the language used, as by inserting "by" in place of "from," or by some other change which would give the phrase a meaning different from that which it would, in the language which the parties have used, ordinarily have. The evidence of the meaning put upon the simple direction to "collect on delivery," by usage, does not aid in interpreting a direction so entirely different as this is, by the addition of a very material clause. The right of the parties to make a different contract cannot be denied them, and every contract must be interpreted accord-

ing to its peculiar terms, and a change so essential as this cannot be assumed to have been made unintentionally. The words added to the usual contract are of familiar and universal use, and have a well-defined meaning; they are not technical or peculiar, or used only in a particular business; and there is no evidence that they were ever used in any other than the usual and ordinary sense.

It was not competent for the defendants to prove the meaning of the contract; they could only prove the peculiar meaning of technical words used; and if words of universal use were used in a technical or peculiar sense, they could prove facts tending to show that they were thus used; but this being done it was for the court to interpret the contract. Neither was it competent for the plaintiff to prove a custom or usage inconsistent with the terms of the contract; and, if the language was explicit, it could not be varied or contradicted by parol evidence, or meaning given to the contract different from that called for by its terms.

Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. But the incident sought to be imported into the contract must not be inconsistent with its express terms or any necessary implication from those terms. Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract. As before suggested, there was no evidence of any usage which could add to, vary or affect, in any way, the meaning of the words "from Turner's Express, Boston."

They are to receive the interpretation and have the meaning given them which they have, as universally used; and in no way can they be read except as a direction to collect the money specified from Turner's Express, on the delivery of the merchandise to that company. Whether such a direction was reasonable or unreasonable is not for us to consider.

5. Effect of Custom.

Conahan v. Fisher. 233 Mass. 234.

Mrs. Conahan was injured by falling through a defective railing of a veranda, which the court found not to be within the control of the landlord, against whom this suit is brought for her injuries. However, the plaintiff attempts to show a custom in Boston that the owner shall make necessary repairs and keep the property tenable.

Held, that a contract is not to be interpreted by reference to a custom which is contrary to positive law.

Rugg, C. J.

A thorough discussion of the nature of custom or usage, the field of human relations which may be affected thereby, and the bounds to which it is subject, is found in *Dickinson v. Gay*, 7 Allen 29, where previous decisions are reviewed, and the controlling principle on the subject is deduced and formulated. It there was held in effect that, although often a usage or custom has been sustained or rejected on the ground that it was or was not regarded as reasonable, the true principle is that a custom or usage, "having reference to the methods of transacting business," is valid, but one which relates to the "mere adoption of a peculiar or local rule of law, contrary to the terms of the contract or to a general rule of law applicable to its construction," is invalid. Respecting the alleged custom there in question of holding a merchant, selling goods by sample, where both sample and the bulk delivered contained a latent defect, nevertheless responsible as upon a warranty against defect, it was said, "the usage proved does not relate to any particular course of dealing, but is the adoption of a mere doctrine as to the rights and obligations of the parties under a contract of sale, which doctrine is contrary to the rule of the common law on the subject. It holds that a warranty is implied, when by law it is not implied. There is no necessity for such usages; because if the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale; or if the manufacturer sells without warranty, he can so express it. But if such usages were to prevail they would be productive of misunderstanding, litigation and frequent injustice, and would be deeply injurious to the interests of trade and commerce. They would make it necessary to prove the law of the case by witnesses on the stand, and it would be settled by the jury in each particular case. Public policy, therefore, requires that when parties assume obligations which the law does not impose, or release obligations which it does impose, it should be done by express contract." That statement of law is precisely applicable to the custom here sought to be shown.

The law itself has fixed with precision the respective rights and obligations of landlord and tenant under an oral lease as to repairs upon the demised premises in the absence of definite contract. It is beyond the province of custom to vary this rule. It can be done only by express contract. Two diametrically opposed principles of law cannot govern the same facts at the same moment.

General commercial customs or particular usages of trade, when not contrary to the express terms or necessary implications of the contract, or a special meaning attaching under the dialect of a particular business, occupation or profession to the use of a word or phrase, and not invoking the application of law contrary to the

established principles of the common or statutory law, are valid. But customs which are in conflict, either with the express or implied terms of the contract, or undertake to avoid the effect of settled rules of law, or to make for a definite class of cases or persons a law singular unto such class, are bad.

6. Requisites of Valid Custom.

Strong v. The Grand Trunk Railroad Company. 15 Mich. 206.

Strong's schooner carried corn from Chicago to Sarnia, and delivered it to the defendant railroad as intermediate consignee. The railroad refused to pay the freight except subject to a deduction of the value of a deficiency of some 200 bushels, which was indicated by comparison with an inaccurate bill of lading. The railroad justified its refusal to pay upon the ground that there was a custom to make such deduction.

Held, that a custom is not to be considered a term of the contract unless it is general and uniform.

Cooley, J.

There can be no doubt that although the bill of lading specifies the amount received, it is, notwithstanding, like other receipts, open to explanation, and the carrier is at liberty to show that the actual amount which came to his hands is different from that stated. The qualification of this rule is where third persons have acquired rights by purchase or advance of money, based upon the statement contained in the bill of lading, and relying upon its accuracy: the extent of which qualification, and when and against whom applicable, it does not become important to discuss here, inasmuch as it is not claimed that any such rights have intervened.

Although the consignee of property is authorized to recoup from the freight earned any losses properly chargeable to the carrier, it is well settled, and indeed follows logically from the rule before stated, that he is not entitled to deduct as deficiencies any difference between the amount delivered to him, and that receipted by the bill of lading, where the carrier can show an error in the bill, and that he actually delivered all that he received.

The custom alleged, if valid, changes the settled law in several important particulars.

There are many customs which, to a certain extent, are convenient, but to which the law does not allow a compulsory force, either because they have never been generally acquiesced in, or because, to give them general application, would in some cases violate fundamental principles and rights. The law has established certain rules which are to test the legal validity of a custom; and we shall now examine the one alleged, in the light of the standard thus afforded.

1. Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute. It is not very clear that the evidence in this case establishes any such custom.

2. Another essential to a good custom is, that it be certain. The evidence of usage in this case does not inform us whether, under it, the carrier is to have any remedy for the freight deducted, and if he is, whether that remedy is left to common law rules, or is provided for by the custom itself.

3. All customs must be reasonable. If the one in question were confined to vesting in the intermediate consignee the same power to refuse to pay freight in cases in which the owner would be justified in doing so, it would not exceed the reasonable province of a mercantile usage. But it goes very much further when it makes the bill of lading conclusive in favor of the intermediate carrier, and allows him to make deductions for supposed deficiencies, not in fact existing, which the owner himself would not be permitted to make.

7. Construction of Terms in Order to Give Contract Validity.

Hunter v. Anthony. 53 N. C. 385.

Holt gave an order to Hunter, a constable, directing Anthony to pay to Hunter all executions against Holt and his brother in Hunter's hands "as they become due." This order Anthony accepted. Hunter now seeks to hold Anthony on certain executions which had been stayed at the time of the order, although they were in the hands of the officer for collection.

Held, that the terms of a contract are to be construed in such a way as to make it valid rather than invalid.

Pearson, C. J.

The papers which were in the hands of the plaintiff can be made to fit the description given in the acceptance of the defendant by aid of the maxim that instruments should be liberally construed, so as to give them effect and carry out the intention of the parties; and when an instrument is susceptible of two constructions, one by which it will take effect, and the other, by which it will be inoperative for the want of a subject-matter to act on, it shall receive that construction which will give it effect. This rule is based on the presumption that when parties make an instrument, the intention is that it shall be effectual, and not nugatory.

"Executions in the hands of an officer," taken literally, would apply to process in his hands which was then in a condition to be acted on, and would not fit judgments in the officer's hands, on which execution had been stayed; but by aid of the words, "as they become due," we see that the word, "executions" is not to be

taken literally, for the papers to which reference was made were some that were about to become due at different times; and taking the whole description, they as aptly point out judgments on which were entered, "executions issued and stayed," as any other terms of description that could have been used.

The suggestion that these words ought to be considered surplusage, has nothing to support it. That is sometimes done in order to give effect to an instrument in which repugnant words are used, but is never applied for the purpose of defeating an instrument.

8. Contract to be Construed Reasonably.

Gillet v. Bank of America. 160 N. Y. 549.

Gillet's assignors, Dan Talmage's sons, were customers of the defendant bank. They procured from the bank a loan of \$35,000, giving a note and collateral security which they agreed the bank might apply upon any liabilities due or to become due to it from them. Subsequently the bank purchased a dishonored note made by Talmage's sons and seeks to apply the collateral to the payment of this note.

Held, that a contract is to be construed reasonably rather than unreasonably.

Martin, J.

The question in this case is whether, under any proper construction of the contract, the defendant was authorized to retain the property pledged until the \$5,000 note was paid.

The respondent's contention is that this agreement and note authorized the defendant to hold the property pledged, not only as security for the sum loaned and such other liabilities as were contracted or existed between them as bank and customer, but also for any and all claims against the plaintiff's assignors which it might purchase, regardless of their character, so long as they were liabilities of the assignors and owned by the defendant. It further claims that under the contract it could have transferred the note and collateral, and that thereupon the transferee would be entitled to retain and sell the property pledged, or in its possession for safe-keeping or otherwise, not only for the payment of the liabilities of the assignors to the defendant, but also for the payment of all and any claims or liabilities of theirs held by the transferee. If these contentions are to be sustained, it must be because they are plainly stated in the contract or necessarily implied from its express provisions. Such unusual and almost unlimited power over the property of another is not to be implied or inferred from doubtful or uncertain language.

If there is any uncertainty or ambiguity as to the meaning of the agreement, it should be resolved in favor of the plaintiff, as

it was the defendant who prepared this contract. If there is any doubt as to the meaning of the terms employed, the defendant is responsible for it as the language is wholly its own. We think the principle controlling as to the construction of insurance policies and other similar instruments is applicable to this agreement, and that it should be liberally construed in favor of the plaintiff. If the language can, without violence, be interpreted to include only such liabilities to the defendant as resulted from transactions between the plaintiff's assignors as customers and the defendant as a bank, or their liabilities which came into its hands in the ordinary course of its banking business, it should be adopted.

The reason of the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them, rather than he who only accepts them. Where a doubt exists as to the meaning of words, resort may be had to the surrounding facts and circumstances to determine the meaning intended. If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe it was understood.

In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation of rules for the construction of contracts is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties and the objects which they had in view, and when the intent is thus ascertained, it is to be effectuated unless forbidden by law. "Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish."

Where there is uncertainty or doubt as to the meaning of words or phrases used in a contract, in seeking for the intent of the parties as evidenced by the words used, the fact that a construction contended for would make the contract unreasonable and place one of the parties at the mercy of the other, may properly be taken into consideration.

The liabilities to the bank, which were contemplated by the parties, were those which arose out of transactions between them, and not through a title to which the bank succeeded by purchase or assignment.

9. **Contracts to be Construed According to the Construction Placed Upon Them by the Parties.**

Topliff v. Topliff. 122 U. S. 121.

Isaac Topliff, the owner of a patent, contracted with John Topliff that John Topliff should have the right to sell certain patented articles and that any improvement by either party should be for the benefit of both. John Topliff subsequently secured a new patent for an improvement and now contends that Isaac Topliff is not entitled to use it, on the ground that the right of each party to the benefit of improvements related only to improvements in the particular type first patented, although the parties had acted upon the contrary assumption.

Held, that contracts are to be construed in accordance with the construction placed upon them by the parties.

Matthews, J.

The subject of the contract is the manufacture and sale of bows and bow-sockets for carriage and buggy tops, in which the parties were to have mutual interests, as defined in the contract. It was supposed, and this undoubtedly was the original basis of the agreement, that the appellee had secured the exclusive right to a valuable improvement in the manufacture of this description of articles. His application for the patent was then pending; the patent was in fact subsequently issued. In the meantime the article as proposed was manufactured and put on sale, and ascertained by experience not sufficiently to answer the purpose. By mutual suggestion and assent improvements in the manufacture were adopted, and some of them embraced in the second patent to the appellee of May 16, 1871. The article made under that patent was treated as the article intended by the contract. Other improvements were subsequently devised and adopted for perfecting the same article, and these were embraced in the patent to John A. Topliff of August 24, 1875. The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article thus manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads

him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the courts as the true one."

10. Inconsistent Written and Printed Provisions.

Hagan v. Scottish Insurance Company. 186 U. S. 423.

Hagan insured a tug boat with the defendant insurance company, the printed policy running by a written insert to "Peter Hagan & Company for account of whom it may concern." Hagan then sold one-half interest in the boat to the other plaintiff, Martin. Upon destruction of the tug, the insurance company claims that it is not liable to Martin on account of a printed provision that no change should take place in the title of the insured.

Held, that when there is a conflict between written and printed provisions in a contract, the written provisions prevail.

Peckham, J.

Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.

If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy, and what was intended by the parties by the language "on account of whom it may concern."

We concur in the view that by virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough.

In this case there is no question of receiving parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the

policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being so stated) is inconsistent with any printed portion thereof; and if so, whether it would prevail as against such printed portion. We think the written portion is inconsistent with the printed condition as to change of interest, and as to sole ownership, and there being such inconsistency the written portion must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance.

11. Terms Implied in a Contract.

Genet v. The Delaware and Hudson Canal Co. 136 N. Y. 593.

The Canal Company agreed with Mr. and Mrs. Genet to operate a coal mine belonging to the Genets and to pay a certain royalty upon the coal mined, specifying a minimum amount to be paid. The Canal Company so negligently mined the coal that it caused the mine to cave in, rendering it thereby totally worthless. The Genets now sue on an implied stipulation against such negligent destruction.

Held, that a contemplated term of the contract may be implied.

Finch, J.

There is no such express stipulation, but I think one is to be implied, and fairly and justly may be found interwoven with the terms expressed, and growing out of their scope and meaning. Here, the lessor, beyond her minimum royalty, took the risk of the defendant's capacity and necessities, of its judgment of markets, of its ability to sell and find customers for the product, of the demands of its own interest and welfare; but the risk she did not take was that the lessee should make royalties beyond the minimum absolutely impossible by a total destruction of the mine out of which the royalties were to come, and that through the agency of its own wilful or negligent act. The plaintiff took a chance undoubtedly; but she was entitled to have it and to have it as she took it; bad enough at the best, but such as it was, hers; and which the defendant was not at liberty wilfully or negligently to destroy.

Implied promises are to be cautiously and not hastily raised. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if

attention had been drawn to it, and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect.

It seems to me that within the rule the plaintiff has a right of action upon the implied promise of the defendant not wilfully or negligently to incapacitate itself from taking out more than the minimum quantity of coal.

12. Construction of Contracts as to Time.

Jones v. Newport News and Mississippi Valley Co. 65 Fed. 736.

Jones built a coal trestle leading to his coal business upon an agreement with the defendant railroad that it would maintain the switch running to it. A freight train belonging to the railroad failed to take the switch and damaged the property of the plaintiff. The railroad company then took out the switch. Jones sues for damages for the taking out of the switch, no time having been specified as to the duration of the contract. The switch had in fact been maintained for some eight years.

Held, that if no time is specified in the contract, it will be construed to imply a reasonable time.

Taft, Cir. J.

The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch was to be maintained at all times, i. e., forever. Such a construction is quite at variance with the views of the supreme court, in [a] case [in which] the city of Marshall filed a bill in equity to enforce an agreement with [a] railroad company under which it had given the railroad company \$300,000 in county bonds and 66 acres of land in the city limits, and the company, in consideration of the donation, agreed "to permanently establish its eastern terminus and Texas office at the city of Marshall, and to establish and construct at said city the main machine shops and car works of said railroad company." It was held that the contract on the part of the railroad company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and set in operation said car works and machine shops there, and kept them going for eight years, and until the interests of the railway company and the public demanded a removal of all or part of these subjects of the contract to some other place; that the word "permanent," in the contract, was to be construed with reference to the subject-matter of the contract, and,

under the circumstances of the case, it was complied with by the establishment of the shops, with no intention at the time of removing or abandoning them; that if the contract were to be interpreted as one to maintain forever the eastern terminus and the shops and Texas office at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity.

[The contract] "did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine shops and car shops there; and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself, and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning."

In the light of this construction of an express agreement to locate and maintain a depot permanently at a town on the line of a railroad, it would seem clear that we should not imply in a contract for a private switch connection a term that it shall be perpetual, and thus forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road.

13. When Time is the Essence of the Contract.

Beck & Pauli Lithographing Co. v. Colorado Milling and Elevator Co. 52 Fed. 700.

The Lithographing Company agreed to furnish to the Milling Company certain lithographs to be specially manufactured upon its order, and to be delivered before January 1, 1890. They did not deliver until shortly after that date, but now sue for the price.

Held, that in contracts for work or skill, time is not construed to be of the essence of the contract.

Sanborn, Cir. J.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent

to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such

as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by a substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation.

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale.

14. Time as the Essence of the Contract in Equity.

Carter v. Phillips. 144 Mass. 100.

Carter and Phillips entered upon a joint enterprise for the manufacture and sale of cloaks, under an agreement whereby either party might terminate the contract on sixty days' notice. It was further agreed that if Phillips should so give notice, Carter might buy the business for a certain price within the time of the notice. Carter informed Phillips of his desire to exercise this option, upon notice by Phillips, but did not offer to perform within the sixty days. He insists, however, that in equity time is not the essence of the contract, and that he may enforce his right within a reasonable time.

Held, that although time is not so strictly construed as the essence of the contract in equity as at law, nevertheless, if the parties agree in a specific case that time shall be of the essence, it is so held.

Morton, C. J.

The contract provided that he should have the privilege of purchasing within sixty days after the notice by the defendant. As he did not offer, and was not able and ready to perform his part of the contract, he cannot insist upon a performance by the defendant if the rights of the parties are governed by their contract.

But the plaintiff contends that time is not of the essence of the contract; and that, in equity, he ought to be permitted to per-

form his part of the contract within a reasonable time after the expiration of the sixty days. The equitable doctrine to which the plaintiff appeals has been recognized and acted upon in many cases in this court. [It] was formerly carried to an unreasonable extent, but in modern times it has been more guardedly applied; "and it is now held that time, although not ordinarily of the essence of a contract in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land, or other circumstances which would make a decree for the specific performance inequitable."

In *Goldsmith v. Guild*, 10 Allen 239, where the plaintiff agreed to pay for land "within ten days" from the date of the contract, it was held that time was of the essence of the contract, as the land was fluctuating in value from day to day. Mr. Justice Chapman says in the opinion, "But this doctrine applies to sales of property only in cases where time is immaterial to the value, and is urged only by way of pretence and evasion, and does not apply to a sale of property the value of which is subject to daily fluctuation." In applying this doctrine to any contract, a court of equity seeks to look through the language used to the real intentions and purposes of the parties; and if a time for performance is stipulated in the contract, and it appears that the parties intended to make such time an essential element of their agreement, the court will carry it into effect. To do otherwise would be to enforce a different contract from that which the parties made.

In the case before us, the contract carefully stipulates the time of the notice for terminating it.

B. Dependent and Independent Terms.

1. In General.

Paine v. Brown, 37 N. Y. 228.

Chamberlain, assignor of the plaintiff, agreed to sell Brown one-fifth of the Central canal in Indiana, for \$10,000, \$2,000 to be paid in July, and the balance in one and two years. In a suit for the first instalment, Brown contends that the plaintiff had not offered to perform and therefore cannot recover.

Held, that no tender of performance is necessary by a party who sues upon an independent term of a contract.

Davies, C. J.

By the terms of this contract, Chamberlain, the assignor of the plaintiff, bound himself to sell and convey by deed of release

the property described to the defendant for the sum of ten thousand dollars, and the defendant agreed to purchase the same and pay that price therefor. No time was fixed by the contract for the conveyance of the property, but the defendant was to pay two thousand dollars of the purchase-money in the month of July, 1859, and the remainder in one and two years, with interest from May 1, 1859.

This case is not unlike that of *Pordage v. Cole*, 1 Saund. 319, and is clearly within the doctrine there settled.

Sergeant Williams, in his learned note to this case, says: "It is to be observed that covenants are to be construed to be either dependent or independent of each other according to the intention and meaning of the parties and the good sense of the case, and that, in order to discover that intention, and learn with some degree of certainty when performance is necessary to be averred in the declaration and when not, it may not be improper to lay down a few rules. First, if a day be appointed for payment of money or part of it, or for doing any other acts, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent, and so it is where no time is fixed for the performance of that which is the consideration of the money or other act." And he adds: "This seems to be the ground of the judgment in this case, the money being appointed to be paid on a fixed day, which might happen before the lands were or could be conveyed. But, second, when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. Third, when a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Fourth, where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of or an offer to perform his part, though it is not certain which of them is obliged to do the first act."

The principles here enunciated have received the approval of the courts of this state.

"Where the payments are to precede the conveyance, it is no excuse for nonpayment, that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so on receiving a good title and then it must be made to him or the contract will be rescinded."

In *Grant v. Johnson*, 1 Seld. 247, the question was whether the

plaintiff could sustain an action for the second instalment of the purchase-money secured by the agreement, without averring and proving the delivery [of], or an offer to deliver, a deed of the premises. This court said: "The parties have declared that certain payments were to be made and certain acts performed by them respectively at the times specified in the agreement. They must be held to have intended the performance of these acts, where and of course in the order of time indicated in their covenants." So, in the case at bar, the covenants to pay the purchase-money in the instalments mentioned were all independent of and intended by the parties to precede the actual conveyance of the property described. The covenant to pay the \$2,000 in July, 1859, was independent of and to precede any act to be done or performed by the assignor of the plaintiff.

2. Entire and Severable Contracts.

Wooten v. Walters. 110 N. C. 251.

Wooten orally agreed to sell Walters two stores and his stock in trade. The terms of price adjustment were separately indicated. Walters took possession of the stores and goods. Wooten now seeks to recover the property.

Held, that the two contracts were severable, and although the contract in reference to the stores was not enforceable because of the statute of frauds, the contract for the sale of the goods was valid.

Merrimon, C. J.

A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety and the purchaser will be liable for the entire sum agreed to be paid. And so also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence, it has been held that where a cow and four hundred pounds of hay were sold for seventeen dollars the contract was entire. "The principle upon which this rule is founded, seems to be that as the contract is founded upon a consideration dependent upon the entire performance thereof, if for any cause it be not wholly performed the *casus foederis* does not arise, and the law will not make provision

for exigencies against which the parties have neglected to fortify themselves." Such contracts are enforceable only as a whole.

On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact. In such a contract the consideration is not single and entire as to all its several provisions as a whole; until it is performed it is capable of division and apportionment. Thus, though a number of things be bought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or when the things [are] of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance, or by one contract. Thus where a party purchased two parcels of real estate, the one for a specified price and the other for a fixed price, and took one conveyance of both, and he was afterwards ejected from one of them by reason of defect of title, it was held that he was entitled to recover therefor from the vendor. So also it was held, where a certain farm and dead stock and growing wheat were all sold together, but a separate price was affixed to each of these things, that the contract was entire as to each item and was severable into three contracts, and hence a failure to comply with the contract as to one item did not invalidate the sale and give the vendor a right to reject the whole contract. In such case the contract may be entire or severable, according to the circumstances of each particular case, and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, "but on the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties." This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case.

Applying the rules of law thus stated to the case before us, we are of the opinion that the contract to be interpreted, treated as executory, is severable and the sale of the goods therein men-

tioned was not necessarily an inseparable part of the land embraced by this contract. Although it is single, it embraces the sale of two distinct things, each having a certain price affixed to it, and the price paid for the whole being susceptible of apportionment. Neither by the terms of the contract settled by the findings of fact, nor by its nature and purpose, does it appear that the store-house lot of land and stock of goods, distinct things, were both necessary parts of an entire contract. These things were not necessary parts of each other; they were entirely capable of being sold separately. Nor does it appear that they were sold as a single whole.

3. Instalment Contracts.

Norrington v. Wright. 115 U. S. 188.

Norrington & Company agreed to ship 5,000 tons of rails "from a European port or ports" to Wright & Sons, at the rate of about 1,000 tons per month, the entire amount to be shipped before August 1, 1880. They shipped 400 tons the first month, 885 the second month, 1571 the third month and continued to deliver fluctuating amounts until Wright & Sons, upon knowledge of the amounts which were being shipped, refused to accept further deliveries. Norrington & Company sue on the contract.

Held, that a contract for the shipment of a quantity of goods by a definite amount per month is not a divisible contract and that a failure to ship the required amounts will justify rescission of the entire contract.

Gray, J.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron.

The contract is not one for the sale of a specific lot of goods,

identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill—in which case the mention of the quantity, accompanied by the qualification of “about,” or “more or less,” is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: “When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words ‘about,’ ‘more or less,’ and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure or weight.”

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The plaintiff, denying the defendants’ right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment.

The Lord Chancellor said: “The contract is for the purchase of 5,000 tons of steel blooms of the company’s manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, ‘Delivery 1,000 tons monthly commencing January next;’ and as to the time of payment, ‘Payment nett cash within three days after receipt of shipping documents;’ but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is

so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel."

4. Tender of Performance as a Condition Precedent.

Loud v. Pomona Land and Water Co. 153 U. S. 564.

The Pomona Land and Water Company agreed to sell property to Loud under a contract whereby he was to pay a certain amount at the time of the making of the contract and a certain amount on other specified dates, and whereby he was to receive no title until after all instalments were paid. The Land Company sues for the first instalment; Loud defends on the ground that the Company did not tender a deed as a condition precedent to the recovery of the instalment.

Held, that the tender of the deed was not a condition precedent to the recovery of the instalment, but on the contrary the payment was a condition precedent to the right to a deed.

Jackson, J.

If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance, on his part. If, however, the payment of the purchase price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of conveyance, and the allegation of its readiness and willingness to convey, upon payment of the purchase money, was sufficient.

The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardships that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall [not] be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?

A subsequent clause of the contract provides that "this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises," and it is further provided that time is of the essence of the contract.

If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract.

The payment of all the instalments of purchase money is a condition precedent to the performance of the land company's covenant to convey.

5. Time of Delivery as Condition Precedent.

Sunshine Cloak and Suit Co. v. Roquette Bros. 30 N. Dak. 143.

The Sunshine Cloak and Suit Company sold merchandise to Roquette Brothers, agreeing to ship for the fall trade. They did not ship until too late for the fall trade and Roquette Brothers refused to accept the goods. The Sunshine Suit Company sues for the price.

Held, that in a contract of sale, delivery within the time specified is a condition precedent to liability for the price.

Christianson, J.

Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument, and the application of good sense and right reason to each particular case. Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfil the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform.

The rule in such cases is that time is and will be of the es-

sence of the contract, so long as the contract remains executory, and that the purchaser will not be bound to accept and pay for the goods, if they are not delivered or tendered on the day specified in the contract.

Cases arise where either party, in case of a breach of the contract, may be compensated in damages; and in such cases it is usually held that the conditions are mutual and independent; but where the conditions are dependent and of the essence of the contract, it is everywhere held that the performance of one depends on the performance of another, in which case the rule is universal that, until the prior condition is performed, the other party is not liable to an action on the contract.

Where time is of the essence of the contract, there can be no recovery at law in case of failure to perform within the time stipulated.

"Conditions," says Story, "may be either precedent or subsequent, but a condition precedent is one which must happen before either party becomes bound by the contract. Thus, if a person agrees to purchase a cargo of a certain ship at sea, provided the cargo proves to be of a particular quality, or provided the ship arrives before a certain time, or at a particular port, each proviso is a condition precedent to the performance of such a contract; and unless the cargo proves to be of the stipulated quality, or the ship arrives within the agreed time or at the specified port, no contract can possibly arise."

If the agreement between the parties was to the effect that the goods were to be shipped by August 15th, then it was incumbent upon plaintiff to show a compliance with this condition in order to recover. When plaintiff failed to comply with this condition defendants were justified in treating the contract as terminated, if they so desired. No duty was incumbent upon them to notify plaintiff.

6. Effect of Failure to Perform Condition Precedent.

Cutter v. Powell, 6 T. R. (Eng.) 320.

A seaman took a note for his services on a voyage from Jamaica to England, agreeing to work the entire voyage. He died three weeks before the ship reached England and his widow sues for the proportionate part of his wages.

Held, that when complete performance of a contract is a condition precedent, partial performance will not warrant compensation.

Ashhurst, J.

We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. And as it is entire, and as the defendant's promise depends on a condition precedent

to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued however that the plaintiff may now recover on a *quantum meruit*: but she has no right to desert the agreement; for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

7. Mutually Dependent Conditions.

Diem v. Koblitz. 49 Oh. St. 41.

Diem sold Koblitz Brothers a quantity of paper bags on thirty, sixty, and ninety days' credit. After shipment, but before the credit expired, Diem stopped the goods, claiming Koblitz was insolvent, and sold them to another party. Koblitz sues for breach of the contract.

Held, that in a sale on credit, the extension of credit is made on condition that the other party shall keep his credit good.

Williams, C. J.

The general rule is, that in contracts of bargain and sale, where there is no agreement for credit, the promise of the vendor to sell and deliver the property, and that of the purchaser to pay the contract price, are mutually dependent, and neither party is bound to perform without contemporaneous performance by the other. Payment, or tender of the price, is the condition upon which the purchaser can require delivery of the property; and delivery or tender by the seller is just as essential on his part if he would sue for the price, or for damages for its nonpayment. If both parties are unable to perform, neither can maintain an action against the other; and therefore, while it is necessary for the vendor, if he would sue, to offer performance on his part, he is in a position to defend, without doing so, if the vendee is not able to perform.

When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day, involving an engagement on his part that he will remain, and then be, able to pay; which engagement is broken when he becomes insolvent, and unable to pay, and hence, the right of the vendor to then stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has

given his notes or bills, or other securities for the price, payable at the end of the time for which the credit is allowed. The vendor, in such case, incurs no liability by not delivering the property, unless the vendee pay or tender the contract price. But in order to sue the vendee, he should offer to deliver according to the contract. "The insolvency of the vendee in a contract for the sale and future delivery of personal property in instalments, payment to be made in notes of the vendee as each instalment is delivered, is sufficient to justify the vendor for refusing to continue the delivery, unless payment be made in cash; but it does not absolve him from offering to deliver the property in performance of the contract if he intends to hold the purchasing party to it; he cannot insist upon damages for nonperformance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good."

The rule must work both ways. The rights and obligations of the vendor and vendee are correlative. If the insolvency of the vendee is sufficient to justify the vendor in refusing to deliver the property, unless payment be made in cash, it follows that the vendor incurs no liability by his refusal, and therefore, no right of action accrues to the vendee, unless payment be made by him. And if the vendor cannot insist upon damages for the vendee's non-performance, without showing an offer on his part with the ability to perform, so, neither can the vendee, if he is without the ability to perform, recover from the vendor.

8. Conditions Subsequent.

Ray v. Thompson. 12 Cush. (Mass.) 281.

Ray sold Thompson a horse, agreeing that he would take the horse back within a specified time if the horse was not satisfactory. Thompson abused and injured the horse so that he was of less value than at the time of the sale, and Ray refused to take him back. Ray sues to recover the price of the horse.

Held, that a person who has put it beyond his power to perform a condition subsequent cannot avail himself of it.

The Court:

The sale was on a condition subsequent; that is, on the condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became uncon-

ditional, and the plaintiff might declare as upon an *indebitatus assumpsit*, without setting out the conditional contract.

9. Conditions Subsequent: See Cases under Discharge by Agreement, III, A, *Infra*.

III.

DISCHARGE OF CONTRACTS.

Contracts may be discharged as follows:

1. By agreement. This form of discharge includes waiving, canceling, and rescinding the contract. It also includes a substituted contract made by a change of terms or a change of parties. Substitution may arise impliedly or expressly. At law, a sealed contract may ordinarily be discharged by executory agreement only if the agreement be under seal, but an agreement not under seal, whether written or oral, may be discharged orally. In some jurisdictions, when the original contract is within the statute of frauds, although a complete discharge may be oral, any substituted agreement must be written. This form of discharge includes that by condition subsequent, which takes place:

(1) by reason of the nonfulfilment of a specified term of the contract,

(2) by the occurrence of a particular event, or

(3) by the exercise of an option.

In order to discharge a contract by agreement, consideration is necessary. It is usually found in the mutual promises of the parties to release each other from the contract.

2. By performance, when the contract has been executed upon both sides. At common law, a strict performance of the terms of a contract was required. At the present time, when a party has slightly deviated from the terms of the contract, but not wilfully, he is entitled to recover the contract price, subject to deduction for the variation, on the theory of substantial performance; or he is entitled to recover the value of the benefit which he has conferred upon the defendant by reason of his work, labor and materials, i. e., upon a *quantum meruit*. Performance may be by payment, including the giving of a negotiable instrument. In most jurisdictions, a negotiable instrument is held to be accepted as payment conditionally upon its payment at maturity. In others, it is assumed to be a complete discharge unless a contrary intent appears. Payment on account must be applied as the debtor directs. If he gives no directions, the creditor may apply it to

any debt which he chooses. If neither makes any application, the court will usually apply it to the earliest debt. When one party tenders performance which is not accepted by the other, the party tendering is ordinarily discharged from further liability. If, however, the tender is an offer to pay something already owing, the party tendering is not discharged, but must keep the tender good. In that event, the effect of the tender, which must always conform exactly to the terms of the contract, is merely to prevent the running of interest and costs.

3. By breach of the obligation which the contract imposes. When one party refuses performance to which the other is entitled, a breach occurs. It may be brought about by renunciation made by one party before the time of performance has arrived. Renunciation operates to discharge the contract if the other party so elects. If, however, he brings suit for damages before the time of performance has arrived, there is a conflict as to his right of recovery. By the general rule, upon the occurrence of such an anticipatory breach, the party injured may sue at once for damages, but another rule requires that he must delay suit until such time as he is entitled to performance. In all jurisdictions, when a breach occurs during the time when a party is entitled to performance, he may sue for future as well as past damages.

4. By impossibility of performance, when that impossibility is created by law. Impossibility of performance arising from subsequent events not contemplated by the parties at the time of the making of the contract will not relieve a party from its obligation unless those events operate as a discharge by condition subsequent, express or implied, contained within the terms of the original contract. Discharge by destruction of the subject matter of the contract is an example of this latter type of case, although it is often considered a discharge by impossibility.

5. By operation of law. Such a discharge may be by:

- (1) Merger. Acceptance of a higher security in place of a lower, merges or extinguishes the lower security. The two securities must be different, the object identical, and the parties the same. A written contract is not a higher security than an oral contract.
- (2) Alteration. Alteration of a written instrument destroys the contract if it is made intentionally by one party without the assent of the other.
- (3) Death. Death of a party discharges those contracts for the fulfilment of which the personal service of the deceased is necessary. Otherwise it has no effect: the executor, administrator or heirs succeed to the rights and liabilities of the original contractor.

- (4) Bankruptcy. Bankruptcy transfers the assets of the debtor to a trustee, who thereupon administers the bankrupt estate. Discharge in this manner may also be a discharge by breach.

A. Discharge by Agreement.

1. Waiver.

Collyer v. Moulton. 9 R. I. 90.

Collyer & Company sue to recover money for a wire bending machine constructed for the defendant partners. After a small part of the work of construction had been done, the plaintiffs' firm dissolved; whereupon the defendant Moulton notified them that he would no longer be responsible for the machine. He claims that the plaintiffs agreed to release him from liability.

Held, that a contract may be waived by mutual consent, so far as it is executory.

Potter, J.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may at any time countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled only to pay for his part performance, and to be compensated for his loss on the remainder of the contract.

As [to] the manner in which a simple contract may be annulled, the rule is that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration; and even so far as it remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side.

So far, therefore, as the contract in the present case remained unfinished on the 10th February, 1865, when the notice was given and the alleged waiver was made, we may consider either that the contract was annulled or waived by consent, in which case (the machine, so far as completed, being tendered or delivered) the plaintiffs could claim only for work and materials to that date without further damages,—or that the work was countermanded by the defendant Moulton, without the assent of the plaintiffs, in which case the defendant would be liable for the part performed and for loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting

to a waiver of the fulfilment of the contract as first made, that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed, stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this, i. e., the part performed; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm?

If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration—one debt would have been substituted for the other.

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration.

2. Substitution of New Contract.

Redding v. Vogt. 140 N. C. 562.

John P. Redding and his wife conveyed two tracts of land to their daughter, Lizzie C. Redding, who agreed to give one-half to her brother, S. A. Redding. Later, Redding and his wife included the same property in another deed to their daughter, this time reserving to themselves a life estate in the entire tract. Lizzie C. Redding then conveyed one-half to her brother, reserving the life estate. In this suit, Lillian Redding, the widow of S. A. Redding, seeks to enforce her rights of dower on the ground that her husband was entitled to his half of the land without reservation of the life estate, founding her claim on the deed first given.

Held, that when two contracts are made concerning the same subject matter, the first will be considered to have been waived by adoption of the second.

Walker, J.

That parties may rescind a contract, either expressly or by substituting another in its place which is so inconsistent with it that the two cannot well coexist and operate at one and the same time, cannot be doubted. Rights acquired under a contract may be abandoned or relinquished either by agreement, or by conduct clearly indicating such a purpose. A contract may be discharged by the substitution of a new contract, and this results: (1) Where a new contract is expressly substituted for the old one; (2) where a new contract is inconsistent with the old one; (3) where new terms are

agreed upon, in which case a new contract is formed, consisting of the new terms and of the terms of the old contract which are consistent with them, and (4) where a new party is substituted for one of the original parties by agreement of all three. Where parties make two contracts upon the same subject matter, which cannot be reconciled without rejecting some of the material stipulations in the one or the other or both, the court will not enter upon this work of expurgation, but will endeavor to give effect to the one contract or the other, as the intention of the parties shall seem to require. "When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of novation in the Roman Law. When an agreement is thus rescinded by novation, the contract in existence prior to the novation loses its individuality, and becomes merged in the new contract. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract, will amount to a rescission of it." When the provisions of two contracts are inconsistent and the second cannot be operative if the first is still in existence, the first is no longer a subsisting agreement. If, upon the facts of our case, therefore, we can gather that the parties intended the two contracts not to coexist, and the second was designed to take the place of the first, the former must be taken to embody the entire and final agreement of the parties.

3. Effect of Substitution of New Contract.

Adams v. Power. 48 Miss. 450.

Power and Jones gave a note running to Carter and Cook for a one-fourth interest in a paper called the *Clarion*, which they bought from Shannon, a debtor of Carter and Cook, to whom the note was made payable at Shannon's request. Without the knowledge of Carter and Cook, Shannon agreed that they would allow the note to be satisfied by means of advertisements to be secured by Shannon. Mrs. Adams sues as assignee of Carter and Cook. Power and Jones attempt to show in defense the collateral contract with Shannon.

Held, that when the note was made to the payees, a novation resulted by substituting them for Shannon as the creditor of the defendants; and that they and their assigns are not bound by any collateral agreement with Shannon.

Peyton, C. J.

In the civil law there are three kinds of novation. 1. Where the debtor and creditor remain the same, but a new debt takes the place of the old one. 2. Where the debt remains the same, but a new debtor is substituted for the old one. This transaction is

called delegation. The essential distinction between delegation and any other novation [is] that the former demands the consent of all three parties, but the latter, that only of the two parties to the new debt. 3. Where the debt remains the same, but a new creditor is substituted for the old one. This is also called delegation, for the reason above given, to wit: that all three parties must assent to the new bargain.

Delegation is the change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead to the creditor; so that the first debtor is acquitted and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor. "Delegation is not made but by the consent of the debtor who delegates another in his place, of the person who is delegated, and of the creditor who accepts the delegation, and who contents himself with the new debtor."

The common law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it. "If A. owes B. £100 and B. owes C. £100, and the three meet and it is agreed between them that A. shall pay to C. £100, B.'s debt is extinguished, and C. may recover that sum against A."

There must always be a debt once existing, and now canceled, to serve as a consideration for the new liability. The action in all cases is brought on the new agreement. But in order to give the right of action, there must be an extinguishment of the original debt. A good novation is an accord executed.

In that kind of novation, called in the civil law delegation, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of contract between them. To establish such privity, there must be a new promise founded on sufficient consideration. And the extinction of the prior debt is a sufficient consideration in such case.

When assent or consideration is wanting, the novation operates only as a species of collateral security. This assent on the part of the debtor is said to be essential, for the reason that he may have an account with his assignor; and he shall not be barred of his right to a set-off, or any defense he may have. Still, if anything like an assent on his part can be inferred, he will be considered as the debtor.

If A. owes B., and B. owes C., and it is agreed by these three parties that A. shall pay this debt to C., and A. is by this agreement discharged from his debt to B., and B. is also discharged from his debt to C., then there is an obligation created from A. to C., and C. may bring an action against A. in his own name. This would be no contradiction or exception to the ancient rule, that a personal contract cannot be assigned so as to give the assignee a right of action in his own name. It is the case of a new contract formed and a former contract dissolved; and the general principles in rela-

tion to consideration attach to the whole transaction. Thus, to give the transaction its full legal efficacy, the original liabilities must be extinguished; for, if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained upon it; but, if this liability be discharged, then it is a sufficient consideration, and if, at the same time, C. gives up his claim on B. as the ground on which B. orders A. to pay C., then the consideration for which A. promises to pay C. may be considered as moving from C.

An important rule of novation is, that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the old contract, they will be canceled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms the action is brought. Hence, too, the new parties cannot avail themselves of defenses, claims and set-offs which would have prevailed between the old parties. This necessarily results from the extinguishment of the old liabilities and the creation of the new relation of debtor and creditor.

4. Discharge by Condition Subsequent: Occurrence of Particular Event.

Gray v. Gardner. 17 Mass. 187.

Gray contracted with Gardner and others to sell them a certain amount of sperm oil. The parties agreed that a higher price should be paid if the supply of sperm oil brought in should be small. To effectuate this intention they agreed upon a fixed price per gallon, and further agreed upon an additional payment if a smaller amount of oil should arrive at certain ports between the first day of April and the first day of October than arrived the previous year during the same period. The price turned out to depend upon the question whether a certain ship had "arrived" on the first day of October, as it had come into harbor on that date, but had not anchored or moored. Gardner contends that the ship had "arrived," and that therefore Gray is not entitled to the additional sum sued for.

Held, that the contract to pay the additional sum was not discharged by the occurrence of the particular event which should discharge the contract by the operation of a condition subsequent.

Parker, C. J.

The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event, viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition; if the obligor would

avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money, on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them; and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before twelve o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor, or is moored. She may sink, or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance; and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

5. Discharge by Condition Subsequent: Exercise of Option.

Fitzgerald v. Allen, 128 Mass. 232.

Fitzgerald agreed to do certain work on a conduit for Allen, who had a contract for the entire work with the Boston Water Board. The contract provided that Allen might cancel the contract if so ordered by the city engineer. This was done, and the plaintiff sues for the value of the work done previous to the cancellation of the contract.

Held, that a contract may be discharged by exercise of an option contained therein.

Lord, J.

The plaintiff commenced to work under a written contract; and, while that contract was in force, his rights, remedies and liabilities were all to be determined by the terms of that contract; but, when that contract was wholly terminated, his rights would depend upon the mode in which it was terminated. It may have been terminated by his own voluntary refusal to continue to perform it, or by the absolute prohibition of the defendants to permit him to perform it, or by his absolute inability by act of God or otherwise, to continue its performance, or by the mutual consent of the parties, or by termination, as in this case, under a power reserved by the terms of the contract itself.

If the special contract is terminated by any means other than voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such

labor and materials may be recovered upon a count upon a *quantum meruit*, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence, and its terms referred to, upon the question of the real value to the defendant of the plaintiff's labor and materials. If the time of performance is extended very far beyond the time fixed by the contract, if the materials furnished are of a very different quality from that provided for by the contract, these facts have necessarily a bearing upon the real value of the services and labor. The original contract price, too, is an important element in determining the value of the labor and materials; and the proportion in value which the work done bears to the whole value of the contract labor and materials is also important in determining the *quantum meruit*.

It follows that the plaintiff was entitled to recover what, under all the circumstances of the case, his labor and materials were actually worth.

6. Discharge by Condition Subsequent: Cancellation.

The Peoria Insurance Company v. Botto. 47 Ill. 516.

Botto took out with the defendant insurance company a fire policy which contained a clause that the company might cancel the policy at its election. Botto was notified of cancellation to take effect the twenty-third day of November, but although he was told that his money would be refunded upon his calling at the company's office, no premiums were returned to him. The insured property was afterwards destroyed by fire, and Botto claims that the policy was still in force.

Held, that in order to effect the cancellation of a contract, the party canceling must restore the consideration.

Breese, C. J.

Admitting, under the clause quoted from the policy, that the company, without cause, could cancel the policy, this power conceded to them did not relieve them from the obligations a party to any other contract is under when a cancellation has been determined upon. The general rule in such cases, we believe, is that the party canceling must restore whatever he has obtained by the contract. If one party rescinds he must return the property purchased in as good condition as when he received it, unless it is entirely worthless.

To effect a cancellation of this policy, the notice should have been accompanied by the tender of the unearned premium. It

was no part of the business of the assured to take his policy to the office, there have it canceled, and then receive the unearned premium. The assured did not desire to have it canceled, and it would be unreasonable that he should put himself to trouble and inconvenience to have that done which he did not wish to have done, and in doing which he was not obliged to take any step. We do not think, with appellants, that Botto's saying "All right," when the letter was handed him, was an assent on his part that he would call at the office, for he testifies he did not read the letter whilst the bearer of it was present, and that not a word was said about premium to be refunded at the office, or at any other place.

We think it is incumbent on every insurance company acting under such a clause as in this policy to tender the unearned premium with the notice of cancellation. The tender must be held to be a condition precedent, else in case of litigation growing out of the transaction, the company would, all the time, have the use of the money of the assured, and he, to that extent, be prevented from effecting any other insurance. We think justice and fair dealing require this, as nothing short of it will put the contracting parties in *statu quo*.

7. Form of Discharge: Contracts under Seal.

McCreery v. Day. 119 N. Y. 1.

McCreery and others had contracted to build part of the Pittsburgh, Youngstown and Chicago Railroad, a one-fourth interest in which they assigned by contract under seal to Garrison, who agreed to bear one-fourth of the expenditures in construction. Later, this agreement was annulled by an unsealed indorsement on the contract. This suit is against Garrison's executor to recover his share of the construction expenses under the original contract.

Held, that a contract under seal may be discharged by a subsequent contract not under seal.

Andrews, J.

The plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal cannot be dissolved by a new parol executory agreement, although supported by a good and valuable consideration, "for, every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." The application of this rule often produced great inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity, and the right given by the modern

rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common law rule has lost much of its former importance. "The ancient technical rule of the common law, that a contract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants, or obligations equitably discharged by transactions of which courts of law had no cognizance. It is a necessary consequence of our changed system of procedure, that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defense to an action on the covenant itself. The technical distinction between a satisfaction before or after breach, seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. So also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such.

In the present case it may be justly said, that when the agreement annulling the contract of March 2, 1882, was executed, there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement, then entered into, should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it [is] admitted by the reply that the contracts of October 25, 1882, were carried out. It is a case, therefore, of an executory parol contract, made in substitution of the prior sealed contract, afterwards fully executed, which clearly, under the authorities in this state, discharged the prior contract.

8. Form of Discharge: Contracts Within the Statute of Frauds.

Cummings v. Arnold. 3 Metc. (Mass.) 486.

Arnold agreed to sell cloth to Cummings' firm on specified terms. The parties later agreed that Cummings should pay cash for the cloth and receive a 5% discount. The defendant, Arnold, insists that such payments have not been made. The question arises whether this new contract can be proved, as the original contract was within the statute of frauds.

Held, that new terms of performance may be substituted orally for a contract originally within the statute of frauds.

Wilde, J.

The general rule is that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.

The principal design of the statute of frauds was that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase. The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defense in this action. So if the plaintiffs had paid for the goods according to the oral agreements to pay cash or give security, and the defendants had thereupon completed the delivery of the goods contracted for, it would have been a good performance of the written contract. If two contracting parties are bound to do certain reciprocal acts simultaneously, the offer of one of the parties to perform the contract on his part, and the refusal of the other to comply with the contract on his part, will be equivalent to a tender and refusal; and in the present case, we think it equivalent to an accord and satisfaction, which was prevented by the fault of the plaintiffs, who agreed, for a valuable consideration—if what the defendants offered to show be true—to vary the terms of the written contract as to the time of payment, and afterwards refused to comply with their agreement. If the defendants on their part had refused to perform the verbal agreement, then indeed it could not be set up in defense of the present action; for the party who sets up an oral agreement for a substituted performance of a written contract is bound to prove that he has performed, or has been ready to perform, the oral agreement.

This distinction avoids the difficulty suggested in some of the cases cited, where it is said that to allow a party to sue partly on a written and partly on a verbal agreement, would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract, or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. We think, therefore, that the evidence of the oral agreements, offered at the trial, should have

been admitted; the same not being within the statute of frauds, and the evidence being admissible by the rules of law.

B. Discharge by Performance.

1. What Constitutes Performance.

Smith v. Brady. 17 N. Y. 173.

Smith agreed to pay Brady a certain sum for building houses under a contract which provided that the final payment should be made when the architects certified that the work was completed. Smith failed to procure such a certificate, but sues on the contract.

Held, that having failed to perform or to attempt to perform a condition precedent, the plaintiff cannot recover.

Harris, J.

Assuming that the contracts had been so far performed as to justify the plaintiff in treating them as substantially executed, as I am inclined to think they were, yet the final payment for the work was to be made when it was completed and a certificate of the architects to that effect obtained. The parties have seen fit to make the production of such a certificate a condition precedent to the payment. The plaintiff is as much bound by this part of his contract as any other. It is not enough for him to bring his action and say that he has completed the work which he undertook to do. He has agreed that the architects named should decide whether the work is completed or not. He cannot now withdraw the decision of this question from them and refer it to the determination of a legal tribunal.

Had it been shown by the plaintiff that he had made application to the architects for the requisite certificate, and that they had obstinately and unreasonably refused to certify, it might have been proper perhaps for the plaintiff to establish his right to recover by other evidence. However this may be, it is not pretended in this case that the plaintiff ever made an effort to procure the certificate. The referee merely finds the fact that "the architects had not given certificates that the work was all done and finished."

The referee has found that the defendant took possession of the cottages and appendages without objection at the time, and appropriated the same to his own use, and it is insisted that, if the production of the architect's certificate was a condition precedent to the right of the plaintiff to bring his action for the balance due upon the contracts, yet the defendant has waived this condition by accepting the work without objection; but it is a sufficient answer to this position to say that, whether or not the performance of the condition in question was waived was a question of fact to be determined by the referee

from the evidence before him, and no such fact has been found by him.

2. Substantial Performance.

Daly & Sons, Inc. v. The New Haven Hotel Co. 91 Conn. 280.

Daly & Sons contracted in writing to install a heating and ventilating system in the Hotel Taft at New Haven, in accordance with specifications. When Daly & Sons had nearly completed the work, which could have been fully completed for \$500, the architects ordered certain changes, and, as Daly & Sons did not agree to these changes, authorized the Hotel Company to secure others to finish the work. The plaintiffs sue for the unpaid balance.

Held, that when a contract is terminated by the other party without fault of one who has substantially performed, he may recover the contract price less what it would cost to complete the contract.

Prentice, C. J.

Doubtless counsel for the defendant are right in saying that the complaint gives evidence that the plaintiff was not looking to a recovery upon the basis of performance, since the averment that the work was done under a contract providing for payment after completion, is unaccompanied by one of completion. But it does not follow from that fact that the amount for which foreclosure may be had is to be determined upon direct proof of the reasonable worth of the labor performed and materials furnished, and not with reference to the contract price presumably embodying an element of profit. On the contrary, the well established rule in this and other jurisdictions is that the reasonable value for which recovery may be had in cases of substantial performance of building contracts, is to be ascertained with reference to the contract price and by deducting from that price such sum as ought to be allowed for the omissions and variations.

The rule stated as applicable to building contracts is an exception to that governing contracts generally. It had its origin in considerations of equity and justice, and its recognition is due to the fact that substantial justice in such cases can be done in no other way. There is no reason why one who has substantially performed such a contract, but unintentionally failed of strict performance in the matter of minor details, should have imposed upon him as a condition of recovery for that of which the other party has received the benefit, the burden of showing by direct evidence its reasonable value, or why he should be deprived of all benefit of the contract which he has substantially performed. The doctrine of substantial performance has had the ap-

proval of the courts for the very purpose of avoiding the hardships arising from the operation of the general rule, and the principles governing its application were designed to work to the fullest attainable extent approximate justice to all concerned.

In the determination of the amount of deduction which ought to be made in the application to specific cases of the rule stated, regard must be had to the circumstances which each presents. A different method, for instance, is required to accomplish the ends of justice where the shortcomings are such as may be remedied and completion according to the contract had without substantial interference with the structure of the building, than where the remedy and completion involves substantial structural changes. In the first case—and that, upon the finding, is this case—the approved method under ordinary conditions is to deduct from the contract price such sum as it would cost to make the work comply with the contract. In the latter case, the amount of deduction might be measured by the diminished value of the building to the owner by reason of the defects. In any case, the deduction is to be so determined that the owner's resultant payment will be fair and reasonable compensation with reference to the contract price for what of value to him he has received and no more, and that the contractor shall receive a fair reward determined by the contract standard for the benefit conferred by him in his attempt to execute the contract.

The fact that the plaintiff was wrongfully prevented by the defendant from continuing with the work does not stand in the way of the defendant's indebtedness to it being determined on the basis of substantial performance. By such performance it won the right to recover with reference to the contract price, and it was not in the defendant's power to deprive it of the benefits of such recovery by a wrongful act. It well may be that in such case the contractor would have the right to treat the contract as rescinded, and avail himself of redress against the wrongdoer by the recovery of damages. But to hold that by reason of an act of wrongdoing on the part of the owner a contractor loses the right which was his by virtue of his substantial performance, is quite another matter.

It is one of the conditions of a contractor's right to recover as for substantial performance, that his default was not wilful or voluntary. The fact that the plaintiff did not continue in its efforts to complete performance until its accomplishment, did not convert its default in that respect into a wilful or voluntary one. It was deprived of the opportunity to do what it was proposing to do and engaged in doing by way of completion of details and correction of faults, by the act of the defendant who, acting upon the authority of a certificate of default given by the architects and proceeding as provided in the contract, terminated its employment. Had this action on the part of the architects and owner been justified by the plaintiff's conduct in respect to the execution of its contract, a very different situation would be presented. But the court has found that there was no such justification for the termination of the plaintiff's employment.

3. Quantum Meruit.

Hayward v. Leonard. 7 Pick. (Mass.) 180.

Hayward contracted to build a house for Leonard to conform to certain specifications. As some of the work done was not in accordance with the terms of the contract, Leonard refused to accept the house. The plaintiff sues to recover the value of his work.

Held, that when a contract has been performed without wilful violation of its terms but not exactly in accordance with the contract, the plaintiff may recover the value of his work and materials.

Parker, C. J.

Different judges and different courts have held different doctrines, and sometimes the same court at different times. The point in controversy seems to be this: whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of the contract. If the materials are of a nature to be removed and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented—there having been no prohibition to proceed in the work after a deviation from the contract has taken place—no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed if the builder could recover nothing.

And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract.

When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract,

we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

4. Quantum Meruit: Effect of Non-Compliance with Terms of Contract.

Gillis v. Cobe. 177 Mass. 584.

Gillis contracted to build an addition to a brewery belonging to the defendants. His firm failed to put iron rods in the concrete as required by the specifications and the floor sank because of the weight of the tanks placed upon it. Gillis sues to recover for the value of his work, not upon the special contract.

Held, that when a special contract has been made and not performed, the plaintiff can recover only to the extent of the value given to the defendant by reason of his efforts.

Loring, J.

Where a contractor does work and furnishes materials under a special contract, he has no right to recover the value of the work plus the value of the materials under a *quantum meruit*, but is limited to the right to be paid for them specified in the contract; no suit can be maintained by him on the common counts until the contract is fully performed, and then only to recover the contract price.

If he resorts to a recovery under the rule in *Hayward v. Leonard*, 7 Pick. 181, because, being in default of the performance of the contract, or, what is the same thing, because, being unable to prove that he did perform the contract, he has no rights under it, he has not the same right to recover for the value of the work done and materials furnished by him, that a person has who has done work and furnished materials as he has been requested to do. In the latter case, it is immaterial whether the result of his work is of any value to the defendant or not. But one who has done work under a special contract, and resorts to a recovery under the principle of *Hayward v. Leonard*, recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant; he comes into court admitting that he has not done what he agreed to do and that he cannot hold the defendant on his promise to pay him the contract price; more than that, he admits that the part which he has failed to perform, is one that so far goes to the essence of the contract, that it is a condition precedent to a recovery by him on the contract; for, if the part which he agreed to perform and did not perform, was of slight importance, it is not a condition precedent; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action, in which the burden is on him, the defendant, to prove the

damage he has suffered from its nonperformance. The only ground on which a plaintiff who resorts to a recovery under the principle of *Hayward v. Leonard* is entitled to recover anything is that, though, so far as his contract rights are concerned, he is entirely out of court, yet it is not fair that the defendant should go out of the transaction as a whole with a profit at his, the plaintiff's expense, and therefore if the structure, which, for the purpose of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is, nevertheless, a thing of some value, the defendant ought to make him compensation therefor. That such is the ground on which a recovery can be had in such a case was laid down in the original case of *Hayward v. Leonard*, and has been repeated in the subsequent decisions.

It is plain, therefore, that the plaintiff who seeks a recovery under the principle of *Hayward v. Leonard* for work done under a special contract does not recover on the same ground as that on which a plaintiff recovers, who has done work as he has been requested to do. So far as his case travels on that ground, he is out of court; his sole claim to be paid anything is that if he is not paid, the defendant will profit at his expense; until he has proved that the defendant will in that case profit at his expense, he has not made out a *prima facie* case to be paid anything, and until he has proved how much that profit will be, his *prima facie* case is not complete. When the fact appears in evidence that the work for which money is sought was done under a special contract, and that the plaintiff cannot recover under the special contract, but still seeks a recovery, there is no question of the value of his work and materials proved in the usual way, and he does not make out a *prima facie* case by proving their value according to regular rules; to make out a case for recovery for such work and materials so furnished, he must prove how much the result of his work had benefited the defendant, he must prove what the fair market value of the thing produced by his misdirected work is, and, until he has done that, he has not made out even a *prima facie* case on which he is entitled to recover anything.

It is not correct to say that the plaintiffs are in this way made liable for the consequential damages caused by the sinking of the floor in cancellation of a sum otherwise due them, without proving that they are to blame for it. In this case, there is no sum otherwise due the plaintiffs. Unless by a happy accident it turns out that the building produced by their work has added to the value of the defendants' land, nothing is due to them. They have failed to prove that they complied with the contract in the construction of the part of the building which has given way, and in satisfying the architect of that fact; that being so, nothing is due them at all, so far as the terms of the contract are concerned; they have no claim to be paid the contract price, for they have failed to prove that they complied with the requirements of the contract in matters going to the essence of it; they have no claim to the value of the work plus the value of the materials, for the work was done and the materials were furnished

under a special contract, and no payment is due for them except upon the terms of the special contract. Their only claim is that it is not fair that the defendants should profit at their expense, and that, for that reason, if the building which is the result of their labor has added to the value of the defendants' land, the defendants should make them compensation therefor and to that extent. That being the sole ground on which the plaintiffs are entitled to anything, the burden does not lie on the defendants to prove that the thing which caused the floor to sink and the building to be of no market value (if it is of no market value), is a thing for which the plaintiffs were to blame. The plaintiffs' case is that the building which they have placed upon the land of the defendants against their wishes has added to the value of the defendants' land; if it does not, they have no rights in addition to their rights under the contract, and it is of no consequence why it is that the building does not add to the value of the land.

5. Negotiable Instruments as Payment.

The Kimball. 3 Wall. (U. S.) 37.

The owners of the *Kimball* chartered her for a sum of money, part of which was payable "after discharge of homeward cargo." While the ship was still at sea, the charterers gave their note for \$10,000 "on account of the charter." They afterwards failed. The owners claim a lien on the cargo for unpaid money.

Held, that by the general rule, the giving of a note does not constitute payment.

Field, J.

The notes were given before the termination of the voyage, and consequently before the balance of the charter became due. Treating them as an advance of a portion of the freight, they could be recovered back, or their amount, if paid, if the vessel did not arrive. Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded if from any cause not attributable to the shipper the goods be not carried. And there was no such special agreement in this case. The notes were drawn so as to mature near the time of the anticipated arrival of the ship, and according to the statement of the broker who made the arrangement, they were given for the accommodation of the shipowner, and were to be held over or renewed in case they fell due before the arrival. The statement is consistent with the nature of the transaction, and is sufficient to repel any presumption, under the law of Massachusetts, that the notes were taken in discharge or payment of the claim for the charter money. The presumption which prevails in that state, that a promissory note extinguishes the debt or

claim for which it is given, may be repelled by any circumstances showing that such was not the intention of the parties.

By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said, as long ago as the time of Lord Holt, that "a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so." Such has been the rule in England ever since; and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground that nothing can be justly considered as payment in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest.

The rule in Massachusetts is an exception to the general law; but even there, as we have said, the presumption that the note was given in satisfaction of the debt may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact.

6. Application of Payments on Account.

Caldwell v. Wentworth. 14 N. H. 431.

At different times Caldwell sold Wentworth quantities of rum, saleratus and molasses. These sales were in part illegal, as Caldwell had no license to sell liquor. Wentworth paid money on account without specifying the items to which it should be applied. Caldwell sues for the balance and the question arises whether any portion of the money paid should be considered as a voluntary payment on account of the illegal sales.

Held, that payments on account are to be applied as the parties intend, but if they have made no application, the law will apply them to the earliest legal debts.

Parker, C. J.

A debtor paying money to a creditor who has several claims against him, may direct the application of the payment to which claim he pleases. The creditor cannot apply what he thus receives against the will and directions of him who makes the payment, and who has at the time a right to control what is then his own. There is no evidence, however, in this case, that Brown gave any express direction respecting the application of the payments.

If the debtor makes no application of the payment, the creditor may at the time apply it to any demand due from the debtor. It has been held that the creditor may make the application at any time before suit, but this is, perhaps, not quite clear. But the right of the creditor to apply a payment made generally to which claim he pleases, extends only to lawful demands. If he have two claims, one of which is legal and the other illegal, he has no right even at the time of payment to apply the payment to the illegal claim. But there is no evidence in the present case that the plaintiff has at any time made any special application of these payments.

If no application of the payment be made at the time by either debtor or creditor, the law will make the application. Some decisions say to the earliest debt. Following out this principle in *Bosanquet v. Wray*, 6 Taunt. 597, the creditor was permitted to apply the payment to a purely equitable debt, and to sue at law for the later legal debt. Other decisions qualify this rule respecting the application to the earliest debt. Particular equities have a precedence, and the principle may be stated to be, that where there is no particular equity or reason for a different application, the law will apply the payment to the earliest debt. Some cases hold, in favor of a surety, that such an application shall be made as will be for his benefit. Other cases hold that for the benefit of the creditor, the application shall be made to the debt least secured. Perhaps these two classes of cases do not present any conflict in principle, although one is in favor of the creditor as against the debtor, and the other favors the surety at the creditor's expense. They may well stand together, applying the last to those cases where there is no surety. They constitute exceptions to the rule applying the payment to the earliest debt, but the present case raises neither of these exceptions.

If the earlier debt is not due and payable at the time of the payment, the law will apply it to the debt which had a later origin but was then due, upon the obvious presumption that the one party intended to pay, and the other must have understood that he was receiving the money in discharge of something which the creditor had the right to claim at the time.

7. Effect of Tender.

Salinas & Son v. Ellis. 26 S. C. 337.

Ellis owed money to Salinas & Son, partly on a mortgage, and partly on an unsecured note. He offered to pay the money due on the mortgage, which the attorney for Salinas & Son refused to accept, unless the whole indebtedness was discharged. Salinas & Son bring an action to foreclose the mortgage.

Held, that tender of payment of money due under a mortgage will discharge the mortgage, although the debt remains.

McGowan, J.

A tender is defined to be "an offer by a debtor to his creditor of the amount of the debt. The offer must be in lawful money, which must be actually produced to the creditor, unless by words or acts he waives production, and the offer must be definite and unconditional."

It seems that when the proceeding was instituted to foreclose the mortgage, the defendant did not make good the tender or follow it up by bringing into court the money which had been tendered and refused; and as that was not done, the plaintiffs insist that the mere tender and refusal must go for nothing. But the defendant claims that while it did not satisfy the debt, upon which there may be judgment, it had at least the effect of discharging the lien of the mortgage, the mere security and accessory of the debt. There is undoubtedly a difference between a mere tender and the payment of money into court. As it was expressed in *Black v. Rose*, 14 S. C. 278: "The payment of money into court under order is certainly more than a simple tender. A tender is an offer to pay by the debtor before suit, and cannot be made after suit brought. It is purely *ex parte*. If it is not accepted, the debtor must retain his money, and if established on plea, the only effect is to stop interest thenceforward on the amount tendered. But a payment into court is different. It is not *ex parte*, but done by order of the court. The money paid in is for the plaintiff, and the possession of it cannot be resumed by the debtor. In the further prosecution of the case, that much is stricken from the record, whether the plaintiff takes out the money or not."

This as to the debt itself. But suppose there is a mortgage of real estate to secure the debt; does a tender (although not brought into court) have any effect upon the lien of that mortgage, and if so, what? All the authorities agree that even at common law, where the legal title is in the mortgagee, the effect of a tender "at the law day," was to satisfy the condition of the mortgage as fully as if payment had been made and the estate revested in the mortgagor.

As the question is really reduced to the time at which the tender is made—whether it must be the day on which the debt falls due and the condition of the mortgage is broken, or may be at any time afterwards before action brought—it is very obvious that the question must be greatly affected by the character given to a mortgage of land in the different states. In those states where the old common law mortgage is still retained, giving to the mortgagee an estate on condition, to become absolute upon the breach of that condition by nonpayment at the day named, we can well understand how the courts would have, as a logical consequence, to hold that, in order to have the effect of discharging the mortgage, a tender must be made punctually at the hour of the day named. But we must confess that where, as in this state, the mortgage is a mere security for the debt, and the legal title remains in the mortgagor, precisely the same after as before the debt is due, we cannot understand why a tender after it becomes due but before suit, should not have the same effect as if

it had been made "at the law day." It strikes us that in all the states where the mortgage of real estate is a mere security for the debt, this, upon principle, should be the ruling.

C. Discharge by Breach.

1. Anticipatory Breach.

O'Neill v. Supreme Council, American Legion of Honor. 70 N. J. L. 410.

O'Neill had a life insurance policy for \$5,000 with the defendant association which it refused to regard as in force beyond the sum of \$2,000, although O'Neill had tendered all payments required. He sues for breach of contract.

Held, that by the general rule an action may be brought for breach of contract before the time of performance has arrived.

Pitney, J.

Numerous reported decisions have laid down the doctrine that where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may, at his option, treat the contract as terminated for all purposes of performance, and maintain an action at once for the damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. The doctrine has been followed in the English courts for more than a half century.

In the leading case of *Hochster v. De la Tour*, 2 El. & B. 678, Justice Crompton said, during the argument: "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time (meaning, of course, for purposes of further performance); but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.' This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal."

And Lord Campbell, Chief Justice, in delivering judgment, said: "It seems strange that the defendant, after renouncing the contract

and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion and that an opportunity is not left to him of changing his mind. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer."

The same rule prevails in the Supreme Court of the United States, where numerous previous decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect.

So far as observed, the only states dissenting from the doctrine are Massachusetts, Nebraska and North Dakota. In *Daniels v. Newton*, 114 Mass. 530, which is the leading case upon this side of the question, it is held that a mere refusal of performance by the promisor, before the time for performance arrives, cannot form a ground of damages. Even in Massachusetts the reasoning on which the decision in *Daniels v. Newton* was based is hardly carried to its logical conclusion. Upon the precise point now presented, however, the authority of *Daniels v. Newton* is still recognized in Massachusetts, as appears from a recent decision in a case that is "on all fours" with the one now before us.

There seems to be no controlling decision in our own state, at least no reported case that is precisely in point.

Upon the whole we are satisfied that the doctrine of *Hochster v. De la Tour* is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit; and the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract and has refused to accept the monthly assessments tendered by the plaintiff in performance of conditions precedent on his part.

2. Damages for Breach During Course of Performance.

Parker v. Russell. 133 Mass. 74.

Parker conveyed land to the defendant under an agreement that the defendant would support him for life. The defendant's house was destroyed by fire, and she ceased to support Parker, who now claims damages for a breach of the entire contract.

Held, that damages for a breach of the contract during a time when the plaintiff is entitled to performance will be allowed for future as well as past effects of the breach.

Field, J.

If the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change her mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

3. Bankruptcy as Breach.

Central Trust Co. v. Chicago Auditorium Association. 240 U. S. 581.

The Frank E. Scott Transfer Company had a contract with the Chicago Auditorium Association whereby the Transfer Company for a term of five years secured the baggage and livery privileges of the Auditorium Hotel. The Transfer Company subsequently went into bankruptcy, and the question arises in bankruptcy proceedings whether the Auditorium Association may claim damages for breach of the contract caused by the bankruptcy of the Transfer Company.

Held that bankruptcy constitutes a breach of a contract terminated by it.

Pitney, J.

It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. There

is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other federal courts are in conflict.

"The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement.

4. Recovery of Penalty for Breach.

Law v. Redditch. (1892) 1 Q. B. (Eng.) 127.

Law agreed to construct sewerage works for the town of Redditch and further agreed that the work should be finished by a certain date or he should forfeit £100, and £5 a week for such time as the work should remain uncompleted. He sues for the amount due, and the town sets up a claim to £160, liquidated damages for failure to complete within the specified time.

Held, that liquidated damages are to be distinguished from penalties, and may be recovered upon nonfulfilment of the terms of the contract.

Kay, L. J.

This contract contains a provision that a lump sum of £100 and £5 for every seven days during which the works remain incomplete after April 30, 1889, may be recovered "as and for liquidated damages." What the meaning of these words is, and why they were inserted in the contract, a short statement of the law on the subject may assist in showing. In early times it was decided by courts of equity that, where a sum of money was agreed to be paid as penalty for nonperformance of a collateral contract, equity would not allow the whole sum to be recovered; but, where the damages for nonperformance of such contract could be estimated, would cut down the penalty to the amount of the actual damages sustained. It was for that very reason that the words "as and for liquidated damages," and similar words, came to be inserted in contracts. The contracting parties meant by the use of them to exclude this rule of equity, and to say that the sum agreed upon should be considered not to be a penalty, but the amount which they themselves assess as being the damages which would be incurred in the event of the contract being broken. It was to avoid the interference of courts of equity that such words were introduced. But then the courts of law interfered, and, as it seems to me, went further than courts of equity had, originally. They held that, though the parties had expressly said that the sum agreed to be paid was liquidated damages and not a penalty, they would construe the agreement as meaning that it should be a penalty.

Lopes, L. J.

The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages. There is a canon of construction which has been referred to by the Master of the Rolls, according to which, if the sum is payable on the happening or nonhappening of one event, it is to be regarded as liquidated damages; but if, on the other hand, it is payable on the happening of several events, some of which would entail very trifling damage, then it is to be regarded as a penalty. For the purpose of applying that rule to the present case, it is necessary first to construe the contract. The material words are, "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30, 1889." I think that two events are here contemplated, one being the completion of the works, the other the removal of the tackle, &c. These are separate matters. Then the contract says, that "in default of such completion" the sums in question shall become payable. In my view those words do not refer

to the clearance of the works, but to the completion of the works mentioned in the first part of the clause. According to the construction which I put upon the contract, only one event is contemplated as that upon which the sums mentioned are to become payable, viz., the noncompletion of the works by the specified day. That being so, it seems to me that those sums are liquidated damages.

D. Discharge by Impossibility.

I. When Impossibility of Performance Operates as a Discharge.

Piaggio v. Somerville. 119 Miss. 6.

The W. A. Powell Transport Company secured a charter of the schooner *Henry S. Little* and assigned that charter to Benn & Company, which in turn assigned to Somerville. Somerville in his turn assigned to Piaggio under an agreement to the effect that Piaggio should pay \$1500 for the assignment upon the clearance of the vessel at Mobile. Owing to the unrestricted submarine warfare conducted by Germany, the owners refused to let the vessel clear and paid a substantial sum to Piaggio in settlement of his rights. Somerville now sues for the \$1500, and Piaggio defends on the ground that the clearance of the vessel was a condition precedent to any liability to the plaintiff.

Held, that performance of a contract is not excused on account of war, and that as the defendant had a subsisting contract, there was either a waiver of clearance or the clearance merely indicated the time of payment.

Smith, C. J.

The contention of the defendant is that the clearance of the schooner *Henry S. Little* at Mobile under the charter party is a condition precedent to any obligation on his part to pay the plaintiff the money sued for, to which the plaintiff replies that the performance of this condition, if such it is, was waived by the defendant when he accepted the seven thousand five hundred dollars from the owners of the vessel, and released them from further liability to him under the charter party, to which defendant rejoins that his acceptance of the money and release of the owners of the vessel from further liability under the charter party cannot be construed to be a waiver of the condition precedent for the reason that he could not have enforced its performance had he tried to do so; the owners of the vessel having been released from the obligation of the charter party because of the danger of being sunk by a German submarine to which

the vessel would have been subjected had it attempted to make the voyage.

The charter party contains no such qualification of the obligation. Consequently the owners of the vessel were bound to transport the cargo of lumber as provided therein, notwithstanding the risk to the vessel of being sunk by a submarine, or pay damages for their failure so to do, for the rule is that when a party by his own contract creates a duty or charge upon himself he is bound to discharge it, although so to do should subsequently become unexpectedly burdensome or even impossible; the answer to the objection of hardship in all such cases being that it might have been guarded against by a proper stipulation.

There are, however, certain classes of events the occurring of which are said to excuse from performance because "they are not within the contract," for the reason that it cannot reasonably be supposed that either party would have so intended had they contemplated their occurrence when the contract was entered into, so that the promisor cannot be said to have accepted specifically nor promised unconditionally in respect to them. These three classes are: First, a subsequent change in the law, whereby performance becomes unlawful. Second, the destruction, from no default of either party, of the specific thing, the continued existence of which is essential to the performance of the contract. And, third, the death or incapacitating illness of the promisor in a contract which has for its object the rendering by him of personal services.

The case at bar cannot be referred to any of these classes, and, in order for it to be brought within the exceptions to the rule of absolute liability, it will be necessary for us to add thereto a fourth class, to wit, a subsequent foreign war or a subsequent change by one or more of the belligerents in the method of waging such a war which renders performance more burdensome to the promisor than when the contract was entered into, but so to do would be without the reason of the exception and contrary to the authorities.

There are a few cases which cannot be referred to any of the three foregoing classes, such as *The Kronprinzessin Cecilie*, 244 U. S. 12, which is erroneously supposed by counsel for the defendant to sustain his contention. In that case a German-owned vessel sailed from New York to Bremerhaven via Plymouth, England, and Cherbourg, France, on the eve of the outbreak of the recent war, having on board, among other articles, a number of kegs of gold consigned to Plymouth and Cherbourg. In order to escape capture by the French or English, it turned back before reaching either of the last-named ports and returned the gold to the shippers, who instituted libels against it to recover the damages alleged to have been sustained by them because of its failure to deliver the gold. The probabilities of the vessel's capture, had it continued its voyage to either the French or the English port, were so great that the court held that it was justified in turning back, and that its owners were thereby excused from performing their contract to transport and deliver the gold,

for the reason that the capture of the vessel was a risk "which, if it had been dealt with (when the contract of shipment was made), it cannot be believed that the contractee would have demanded or the contractor would have assumed." No such reason can be assigned here for the exclusion from the contract of the risk which the *Henry S. Little* would have run by making the voyage to Italy demanded by the defendant when we remember that commerce was not suspended because of Germany's unrestricted submarine warfare; but, on the contrary, vessels owned by citizens of both neutral and belligerent countries sailed continuously in the waters in which that warfare was being waged.

2. Impossibility Created by War.

Blackburn Bobbin Co., Ltd., v. Allen & Sons, Ltd. (1918) 1 K. B. (Eng.) 540.

Allen & Sons contracted to deliver to the Bobbin Company Finland birch timber, the delivery of which became impossible upon the outbreak of the war. The Bobbin Company sues for damages. The defense is that the continuation of peace was an implied term of the contract.

Held, that a contract is not discharged by impossibility of performance arising from a state of war.

McCardie, J.

The question at issue is this: When will a change of circumstances (not due to the default of either party) cause a dissolution of contract? The law upon the matter is undoubtedly in process of evolution. The point must presumably be solved upon broad existing principles of contract law. Those principles, I conceive, should be the same whether the case be one of charter party, building contract, or sale of goods. But the application of the principles may vary with the terms and subject matter of the contract. Is there a conflict at the present time between the rules which are relevant to the present case? The original rule of English law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The original rule has again and again been restated. The first true modification of the original rule was created, I think, by the doctrine of commercial frustration. "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." If these words are to be

applied to their widest extent they may well effect a revolution of contract law. The next true modification of the original rule was finally effected by the decision in *Taylor v. Caldwell*, 3 B. & S. 826. There the contract was held dissolved by the destruction of its subject matter. The doctrine of *Taylor v. Caldwell* was enlarged by the *Coronation* cases, of which *Krell v. Henry*, (1903) 2 K. B. 740, is the most vivid example, for in *Krell v. Henry* the court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved.

So stood the decisions at the outbreak of the present war. Since that event judgments have been delivered as to the true effect of the decisions I have stated. On the one hand the original rule has been stated to exist in its integrity, whilst on the other hand the modification of the rule is deemed to be clearly settled.

But by what tests and subject to what limitations is the *Krell v. Henry* rule to be applied? No indication has yet been given as to the extent of its operation. At the outbreak of war a vast body of commercial contracts existed which contained no clauses whatever providing for that event. No one can doubt that such contracts had been made upon the assumption that peace would continue. Neither side contemplated the occurrence of war. But it cannot be that all such contracts were dissolved by the events of August, 1914. The mere continuance of peace was not a condition of the contract. The destruction of a state of peace is not of itself a destruction of any specific set of facts within the *Krell v. Henry* rule. Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain.

To supply an answer to the above questions is a task of great difficulty in the absence of any authoritative guidance, for it calls not only for a reconciliation of apparently conflicting lines of cases, but it calls also for the ever embarrassing duty of deciding whether an implied term shall be read into a given contract to the effect that dissolution shall take place if an un contemplated and serious change of circumstances occurs. The decisions with respect to personal services throw, I feel, but little light on the matter, for it seems just and reasonable to imply a condition in such agreements that the contract shall be dissolved upon the death or physical incapacity of the person who has agreed to give his personal services. Death and illness are unceasing features of human society. I think, however, that assistance is derived from considering broadly the nature of the cases in which the *Krell v. Henry* rule has been applied, whether before or after that decision in 1903. It will be observed that they apparently fall into several classes: First, where British legislation or Government intervention has removed the specific subject matter of the construction from the scope of private obligation. I myself venture to think that this is an independent class of case, though, for the purpose of clearness, I classify it as falling within *Krell v. Henry*; secondly, where the actual and specific subject matter of the contract

has ceased to exist, apart from British legislation or administrative intervention; thirdly, where a specific set of facts directly affecting a specific subject matter has ceased to exist (see *Jackson v. Union Marine Insurance Co.*, L. R. 10 C. P. 125, the case of a ship); fourthly, where a specific set of facts collaterally only affecting a specific subject matter, but yet constituting the basis of contract, has ceased to exist (see *Krell v. Henry*, (1903) 2 K. B. 740, the letting of specific premises); and, fifthly, where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance. I need not, of course, classify or illustrate the cases in which British legislation has directly prohibited the performance of a contract. In such cases the doctrine of illegality dissolves the bargains.

My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell v. Henry*, even though there has been so grave and unforeseen a change of circumstance as to render it impossible for the vendor to fulfil his bargain. If I were to hold otherwise, I should create a rule the results of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits.

3. Discharge by Impossibility of Performance Arising from Destruction of the Subject Matter.

Butterfield v. Byron. 153 Mass. 517.

Butterfield made a contract with Byron whereby Byron agreed to build a hotel on land belonging to Butterfield, Butterfield doing the excavating, brick work, painting and plumbing. The hotel was struck by lightning and burned to the ground just before completion. Butterfield sues to recover the amounts he had already paid Byron and expended upon the property.

Held, that when a contract becomes impossible of performance by reason of the destruction of the subject matter, it is discharged.

Knowlton, J.

It is well established law, that, where one contracts to furnish labor and materials, and construct a chattel or build a house on land of another, he will not ordinarily be excused from performance of his contract by the destruction of the chattel or building, without his fault, before the time fixed for the delivery of it. It is equally well

settled, that when work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other. In such cases, from the very nature of the agreement as applied to the subject matter, it is manifest that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract, as if it were written into it, and by its terms the contract is not to be performed if the subject matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived.

The fundamental question in the present case is, What is the true interpretation of the contract? Was the house while in the process of erection to be in the control and at the sole risk of the defendant, or was the plaintiff to have a like interest, as the builder of a part of it?

What are the rights of the parties in regard to what has been done in part performance of a contract in which there is an implied condition that the subject to which the contract relates shall continue in existence, and where the contemplated work cannot be completed by reason of the destruction of the property without fault of either of the parties, is in dispute upon the authorities. The decisions in England differ from those of Massachusetts, and of most of the other states of this country. There the general rule, stated broadly, seems to be that the loss must remain where it first falls, and that neither of the parties can recover of the other for anything done under the contract. In England, on authority, and upon original grounds not very satisfactory to the judges of recent times, it is held that freight advanced for the transportation of goods subsequently lost by the perils of the sea cannot be recovered back. In the United States and in Continental Europe the rule is different. In England it is held that one who has partly performed a contract on property of another which is destroyed without the fault of either party, can recover nothing; and on the other hand, that one who has advanced payments on account of labor and materials furnished under such circumstances cannot recover back the money. One who has advanced money for the instruction of his son in a trade cannot recover it back if he who received it dies without giving the instruction. But where one dies and leaves unperformed a contract which is entire, his administrator may recover any instalments which were due on it before his death.

In this country, where one is to make repairs on a house of another under a special contract, or is to furnish a part of the work and materials used in the erection of a house, and his contract

becomes impossible of performance on account of the destruction of the house, the rule is uniform, so far as the authorities have come to our attention, that he may recover for what he has done or furnished. In *Cleary v. Sohler*, 120 Mass. 210, the plaintiff made a contract to lath and plaster a certain building for forty cents per square yard. The building was destroyed by fire which was an unavoidable casualty. The plaintiff had lathed the building and put on the first coat of plaster, and would have put on the second coat, according to his contract, if the building had not been burned. He sues on an implied assumpsit for work done and materials found. It was agreed that, if he was entitled to recover anything, the judgment should be for the price charged. It was held that he could recover. In *Hollis v. Chapman*, 36 Texas 1, and in *Clark v. Franklin*, 7 Leigh 1, the recovery was a proportional part of the contract price. If the owner in such a case has paid in advance, he may recover back his money, or so much of it as was an overpayment. The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable. Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure completely to perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done.

4. Discharge by Subsequent Illegality.

Heart v. East Tennessee Brewing Company. 121 Tenn. 69.

In 1902, Heart leased property in Knoxville to the Brewing Company for a term of eight years to be used as a saloon. In 1907, the sale of intoxicating liquor was prohibited in Knoxville from and after Nov. 1. Heart sues for rent accruing after Nov. 1.

Held, that he cannot recover for the reason that when performance of a contract becomes illegal, each party thereto is discharged from further obligation thereunder.

Shields, J.

It is a principle of general application that all contracts are void

which provide for doing a thing which is contrary to law, morality, and public policy.

It has been applied to contracts of this character, and held, for that reason, that the rent contracted to be paid could not be collected.

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms.

That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may indeed be regarded as an impossibility by act of law; and it is put upon the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do that which it forbids his doing. Therefore, if one agrees to do a thing which is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise, and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do, this act also avoids the agreement.

Where the performance of an executory agreement which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties discharged from its obligations.

The rule has also been frequently applied by this and other courts of last resort. In *Railroad Company v. Green*, 9 Heisk. 592, it was held that a contract for the payment of Confederate notes, lawful when made, but afterwards made unlawful by law, could not be enforced. It is there said:

"The law has therefore made it impossible for the plaintiff to perform that portion of the condition precedent which required them to demand payment in Confederate notes. The nonperformance of a contract will always be excused where it is occasioned by act of law."

The case of *Gray v. Sims*, Fed. Cas. No. 5729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of congress illegal to import goods into the United States from these points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said:

"But if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

*E. Discharge by Operation of Law.***1. Merger.***Witbeck v. Waine.* 16 N. Y. 532.

Witbeck bought land from Waine under an agreement in writing which provided that the price should be increased or reduced pro rata, as the farm contained more or less than 130 acres. A deed was given containing no statement as to this contract. Witbeck sues to recover the proportionate amount of the price paid as the farm contained less than 130 acres. Waine contends that the original contract was merged in the deed.

Held, that a contract is ordinarily merged in a subsequently executed deed, but the rule applies only when the contract relates to the same subject matter.

Denio, J.

Unless there is a sound distinction between the present case and those which were referred to by the defendant's counsel, we must hold the law to be that the delivery and acceptance of the conveyance canceled and extinguished the prior executory agreement, and that it cannot be any longer resorted to to ascertain the terms upon which the land was sold. It is a general rule of evidence, as well settled as it is salutary, that a written contract executed between parties supersedes all their prior negotiations and agreements upon the same subject. This is especially true where the final contract is an executed one, and those which preceded it were in their nature executory and looked for their consummation to a conveyance afterwards to be made. The rule, however, is not applicable where the last contract covers only a part of the subjects embraced in the prior one. Where, for example, one contracts, for a specified consideration, to convey land at a future time, and to do, at a still later period, other acts for the benefit of the other contracting party, or where the contract is for a series of acts to be performed at successive periods, it is plain that the prior contract is superseded only as to such of its provisions as are covered by the conveyance made pursuant to its terms. The agreement remains in full force as to all its other provisions. This is so obvious, upon the reason of the thing, that we need not ask for authority to sustain it.

I think, moreover, that the authorities which are relied on are clearly distinguishable from the present case.

In the case before us the plaintiff's stipulations respecting the unpaid portions of the purchase money remained, and were intended to remain, unaffected; and the provision for adjusting that purchase money according to the actual contents of the farm was inseparably connected with and naturally formed a part of the covenants for its

payment. I conclude, therefore, that the fact of the conveyance of the farm did not preclude the plaintiff from subsequently claiming a proper deduction on account of the deficiency of the land.

2. Alteration.

Wood v. Steele. 6 Wall. (U. S.) 80.

Newson secured a loan of money from Wood upon a note made by himself and Steele. After Steele had signed the note, the date was changed from Sept. 11 to October 11, without the knowledge of Steele, who contends that the alteration releases him from liability.

Held, that a material alteration of a contract discharges it by operation of law.

Swayne, J.

It was a rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it. In *Master v. Miller*, 4 Term. 320, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such case are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases.

The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly.

3. Death.

Siler, Adm'r. v. Gray, Adm'r. 86 N. C. 566.

J. R. Siler conveyed property to his son, L. F. Siler, in consideration of which the son agreed to support his father and mother as long as they should live. After the death of both father and son, the plaintiff, the administrator of the estate of J. R. Siler, sues the defendant, the administrator of the estate of L. F. Siler, for failure, after the death of L. F. Siler, to support the father and mother prior to the death of the father, and the mother thereafter.

Held, that death discharges a contract which contemplates personal services.

Ruffin, J.

The general rule unquestionably is, that the personal representatives of a party are bound to perform all his contracts, whether specially named in them or not, or else make compensation for their nonperformance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself in person.

"All contracts for personal service, which can be performed only during the life of the contracting party, are subject to the implied condition that he shall live to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his death."

In such cases, it is held that the act of God furnishes an excuse sufficient.

Assuming such to be the law, under which does the case at bar fall? The general rule, or the exception as stated? This must depend upon the intention of the parties, for at last, it is in every case purely a question as to their intention.

It is true that the cases put down in the books, like those cited by us, are generally those in which the contracts sued on have been to marry—to teach an apprentice—to render services as an author, or as a doctor or a lawyer—such as will be determined by the very nature of the services to be rendered or the skill requisite to perform them, to the exclusion of all thought of performance by any other person than the contracting party.

But still this is so, even in contracts of that nature, because the law implies such to have been the intention of the parties, and for that reason, and that alone, construes them to be personal contracts, and takes them out of the general rule.

If in the lifetime of all the parties, the defendant's intestate had sought to introduce a stranger into the family, and through his agency to have performed the services stipulated to be rendered by himself, can it be supposed that the law would, for one moment, have tolerated such a course? And if not, then should the law, after his death, furnish a substitute for him, in his administrator, when he, himself, could not appoint one? We think not; and for the reason that the parties to the contract, manifestly, never contemplated or intended that there should be one.

Our conclusion is therefore that so much of said agreement as imposed upon the defendant's intestate the duty of providing for the plaintiff's intestate and his wife, and of looking after their comfort, was purely personal in its nature, and inasmuch as the defendant could not have enforced his right to perform it, so neither is he liable to an action for not having done so.

4. Bankruptcy.

Zavelo v. Reeves. 227 U. S. 625.

Reeves sues Zavelo upon a debt, a portion of which had been discharged by a composition with creditors made by Zavelo in the course of bankruptcy proceedings, in which Reeves joined. Reeves had loaned Zavelo \$500 for the purpose of effecting that composition, upon a promise by Zavelo to pay the balance as part consideration for the loan.

Held, that a new promise made during bankruptcy proceedings revives a debt otherwise discharged by operation of law.

Pitney, J.

It is contended that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.

It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the

bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge.

Chapter III.

SALES.

I.

THE CONTRACT OF SALE.

The law of sales is a branch of the law of contracts subject to special rules at common law and by statute. Most of the great commercial states* have adopted the Uniform Sales Act, which embodies in statutory form the main principles of the common law and tends to eliminate conflict of decisions. This chapter will in general follow the terms of that statute.

A sale of goods is an agreement whereby the seller transfers the title to goods to the buyer for a consideration called the price. An agreement to sell is distinguished from a sale in that a sale represents an actual transfer of title, while an agreement to sell is merely a contract to make such a transfer in the future. A sale gives rights against the goods themselves, while an agreement to sell gives only a right of action for breach of contract.

A sale involves as its elements:

1. An agreement.
2. A transfer of property. This property is called the title, or general ownership. It is to be distinguished from that special title which belongs to anyone who lawfully has goods in his possession.
3. Goods. Goods include all personal property other than things in action and money. Things in action is a translation of the old legal term, "choses in action," which means rights flowing from one person to another.

* The jurisdictions which have adopted the Sales Act are as follows:

Arizona	Michigan	Ohio
Connecticut	Minnesota	Oregon
Idaho	Mississippi	Pennsylvania
Illinois	Nevada	Rhode Island
Iowa	New Jersey	Tennessee
Maryland	New York	Utah
Massachusetts	North Dakota	Wisconsin
	Wyoming	Alaska

4. Price. The price may be fixed by the terms of the contract or may be left to be fixed in such manner as may later be agreed upon. It may be determined by the course of dealing between the parties. Under the statute it may be made payable in any personal property.

A sale is to be distinguished from other transactions somewhat similar in nature:

1. Bailment. A bailment is the delivery of an article of personal property to another for a special purpose, with the understanding that it is to be returned when that purpose is accomplished. The bailee has a special, not a general, property in the goods. That is true even though the goods are to be returned in a different form. A difficult question arises when goods are entrusted to another on the understanding that they may be mixed with goods belonging to other persons, with an agreement for the return, not of the specific goods, but of a proportionate part of the mass. Some courts hold that such a transaction is a sale, on the theory that the agreement does not require the return of the goods so deposited. Other courts hold that it is a bailment, since the different depositors own the entire mass in common. Care should be taken to distinguish between a bailment with an option to buy, and a sale or contract to sell. A bailment with option to buy should in turn be distinguished from a conditional sale, which is a contract to sell accompanied by the delivery of goods, with reservation of the title in order to secure payment of the price, which the buyer is bound to pay.

2. Pledge. A transfer of property as security for a debt without transfer of title, is a pledge. The pledgor may still transfer the title to a third person, subject to the special property of the pledgee. If goods are delivered by way of security, it may always be shown that the real intention of the transaction was to pledge and not to sell, even though the form is that of a sale.

3. Chattel Mortgage. A chattel mortgage differs from a pledge in that the general property in the mortgaged goods is transferred to the mortgagee. It differs from a sale in that the title reverts to the mortgagor upon performance of the condition.

4. Exchange. If the consideration for a transfer of the property in goods is other property, no price being fixed for either, the transaction is an exchange or barter, not a sale.

5. Contract for work, labor and material. The distinction between a sale of goods and a contract to do work or furnish material is important chiefly in reference to the statute of frauds. Some courts hold that if the property is to be manufactured especially for the buyer upon his order, and is not such as the seller

ordinarily manufactures for the general market, the contract is for work, labor, and material, and not a contract to sell. Other courts hold that such a contract is a contract to sell in spite of the fact that the vendor must furnish materials and do special work for the vendee.

The ordinary rules of the law of contracts as to offer and acceptance, form, consideration, capacity, reality of consent, and legality of subject matter apply to the law of sales. The section of the statute of frauds which applies to these contracts is the seventeenth section of the old English Statute of Frauds, which in the Sales Act is as follows: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." The amount of money involved which brings a sale within the statute differs with the different states. Under the early English act, it was ten pounds, and many of the states originally adopted the sum of fifty dollars. The amount is now generally higher.

In all the states which have enacted the Uniform Sales Act without amendment, this amount is five hundred dollars. A different sum is specified in the statutes of the following states:

Arkansas	} \$30	Connecticut	} \$100
Maine		Michigan	
Missouri			
New Hampshire,	\$33	California	} \$200
Vermont,	\$40	Nevada	
Maryland	} \$50	Ohio,	\$2500
Minnesota			
New York			
Wisconsin			

The note or memorandum required must be signed by the party to be charged, and must state:

1. The names or descriptions of the parties;
2. The price, if agreed upon;
3. The nature of the goods;
4. Other material terms of the contract;
5. Which is the buyer and which is the seller.

It is sufficient in most jurisdictions that the party who is to be sued upon the memorandum shall have signed his name to it by mark or initials in pencil, printing, or otherwise, but some states hold that the memorandum must be signed by both parties, on the theory that unless both have signed, the contract is void for want of mutuality. In the conception of these courts, the party who has not signed should have no right of action against the party who has signed, when that other party has no right of action against him.

Acceptance is the assent of the buyer that the goods are taken by him under the contract, and indicates his intention to hold the seller to the contract. In the case of a sale of specific goods, the acceptance ordinarily takes place when the contract is made. The buyer, by making the contract for the special goods, indicates his assent to take them. This acceptance becomes conclusive in most jurisdictions when any part of the specified goods is received. In a few states, even in such cases it must distinctly appear that the goods were accepted under the contract.

Earnest is something of value, not a part of the price, given to indicate the assent of a party to the bargain. It is rarely recognized in this country, for part payment has almost completely taken its place. Part payment is something of value which is part of the price, given to indicate the assent of a party to the bargain. Earnest or part payment may be given at, or subsequent to, the time of the contract of sale, and in some states may be delivered even before the contract itself is made.

A. The Contract of Sale in General.

1. Definition.

Gardner v. Lane. 12 Allen (Mass.) 39.

Wonson & Brothers owed Gardner about \$1300. They gave him in payment a bill of sale covering 135 barrels of No. 1 mackerel which they pointed out to him, whereupon he discharged his claims against them. No delivery was made, but these barrels were marked with Gardner's name and were set aside for him. Later, Lane seized them upon an execution against Wonson. It turned out that the barrels contained two grades of mackerel, instead of only No. 1 grade as agreed, and that some of them contained nothing but salt. Gardner claims title to the property.

Held, that a sale involves the elements of any other contract.

Bigelow, C. J.

The question at issue in the present case is not whether the

property in certain chattels has passed, as between vendor and vendee, but whether a purchaser has acquired a valid title thereto as against an attaching creditor of the vendor. It often happens that under a contract of sale a title may pass as between the immediate parties to the contract which cannot be set up to defeat the rights of third persons. For example, a delivery of property may not be necessary to vest a title in a vendee as against his vendor, but it is always essential to pass the title as against creditors or bona fide purchasers without notice. Upon the same principle, no right by way of estoppel can arise in favor of the plaintiff in this action, on the ground that the original owner of the property in controversy has done certain acts, the effect of which is to preclude him from asserting any title to it as against the plaintiff. Such acts might avail the plaintiff, if the issue was between him and his vendor. But the creditors of the latter cannot be affected by them. They have the right to hold the property by attachment to secure their debts, unless it appears that a valid sale and delivery has vested a legal title to it in the plaintiff. Besides, the effect of an estoppel *suo vigore* is not to pass a title to property, but to preclude a party from setting up any right or claim to it. A debtor cannot, by his dealings with a third person to which his creditor is neither party nor privy, shut out the latter from his right to sequester his debtor's property by attachment and execution. The only mode in which such right can be defeated is by proof of a valid sale and delivery under and by virtue of which a title to the property has passed to and become vested in the vendee prior to the attachment or seizure by a creditor.

The single test by which to determine which of the two parties to this action has the better title to the property in dispute is to ascertain whether the plaintiff's evidence shows a valid sale and delivery to him prior to the attachment by the defendant. The solution of this question depends, we think, on the most elementary principles, although in their application to the facts in proof a nice discrimination may be required.

The ordinary definition of a sale, as a transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up the contract. A more complete enumeration of these would be, competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject matter of the sale and to the price to be paid therefor. If any of these ingredients be wanting, there is no sale. Thus it cannot be doubted that if under a contract of sale a delivery was made, through mistake, of an article different from that agreed upon by the parties, there would be no sale of the article delivered, and no property in it would pass, for the simple reason that the vendor had not agreed to sell nor the vendee to buy it. There would in fact be "no contract between the parties in respect to the article actually furnished"; or, to express it in different words, when a material mistake occurs in respect to the nature of the subject

matter of a sale, there is no mutual assent, and therefore the contract is void.

Applying this principle to the facts proved at the trial, it would seem to be clear that no title passed to the plaintiff in the barrels of salt and No. 3 mackerel, because he made no agreement for the purchase of these articles. His agreement or contract of sale was for articles of an entirely different kind, and at the time of the attachment he did not know that the articles which had been delivered to him were not the same in kind as those which he had agreed to purchase. Nor had he then assented to receive the articles delivered as being in conformity to, or in pursuance of, his previous contract of sale, unless it can be said that a party assents to that of which he has no knowledge.

2. Sale and Contract to Sell Distinguished.

Walti v. Gaba. 160 Cal. 324.

Walti and another, the plaintiffs, agreed to sell to Gaba and another a spring clip of wool at 18c, and a fall clip of the preceding year at 14c, per pound. At the time of making the contract, the fall wool was stored in a warehouse, but the spring clip had not yet been made. Two hundred and fifty dollars was paid on account; the balance was to be paid on delivery. In May, shortly afterwards, the warehouse was burned and the fall clip destroyed. The plaintiffs tender the spring clip and demand payment in full, which the defendants refuse to make.

Held, that the transaction was a contract to sell, not a sale; that, therefore, title had not passed, and the loss must fall on the seller.

The Court:

Appellants' theory was and is that the transaction had between them and defendants was an absolute sale, and that title passed to all the wool involved at the time the memorandum was signed by Walti and Bourdieu and the \$250 paid by Gaba and Magdison.

If this theory of the case be correct it is certain that defendants should bear the loss of the destroyed wool and should pay for the entire amount. But the respondents contend that the transaction constituted an agreement to sell and to buy only, and that no title passed at the execution of the contract or would pass until delivery of the wool.

The court found "That the plaintiffs did not sell and the defendants did not buy any wool by the agreement in writing, but the plaintiffs agreed to sell and the defendants agreed to buy the wool mentioned in the agreement in writing upon the terms and conditions therein set forth and contained, and that the agreement in writing constituted and was one entire contract by which the defendants agreed to pay the balance of the price of all the wool therein mentioned

upon the delivery of all the wool therein mentioned by the plaintiffs, to them, the defendants." It is the correctness of this finding that is attacked.

We are of the opinion that the interpretation adopted by the court of the transaction is sufficiently supported by the writing itself and the evidence as to the circumstances and conditions surrounding its execution.

It is true that the writing states that "I have this day sold, etc.," but the use of the word sold or the word bought does not always import a present sale, but such words are frequently used where the parties in fact intend only an agreement to sell.

If the contract now under discussion had only referred to spring wool, which was still growing on the backs of the sheep at the execution of the contract, and had then still to be fully grown, sheared and delivered at Kings City, by appellants, there could hardly be room for discussion as to the fact that no title passed at the execution of the contract. The rule is "Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of the circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of property."

The court was justified in finding that the contract was entire. The circumstances under which the contract was executed as well as the wording of the contract indicate that it was an entire contract for the purchase of all the wool, both spring wool and fall wool. Under the contract the sellers could not compel acceptance and payment for the fall wool, unless they also delivered the spring wool. Neither could they compel payment for the spring wool unless they delivered the fall wool.

3. Necessity of Agreement on Terms of Sale.

Summers v. Mills. 21 Tex. 77.

Summers & Company ordered goods from a Boston firm which accepted the order upon conditions which appear in the opinion, and forwarded the goods. Upon finding that Summers' credit was not good, the Boston firm, not having received notes in accordance with the conditions specified, instructed Mills, then in possession of the goods, not to deliver them to Summers. Summers sues Mills for failure to deliver.

Held, that there was no agreement of sale as the plaintiff did not accept the terms of the contract.

Wheeler, J.

There must be a contract of sale, to pass the property. And there is no contract unless the parties thereto assent; and they must

assent to the same thing in the same sense. There was, in this case, a proposal to purchase and an acceptance of the proposal, but the terms of the sale were not agreed on. In the proposal to purchase, nothing was said respecting terms; but the vendors having communicated their terms, and supposing they would be assented to, shipped the goods without waiting for the answer containing the vendee's acceptance of them. The terms were never accepted, and there was, consequently, no contract of sale. The terms proposed called for notes payable in six months at the office of R. & D. G. Mills, in Galveston, with exchange, and, if a further extension of time was required, the notes should bear interest after six months. The notes returned, in reply, were made payable in nine and twelve months at the office of C. Ennis & Co. in Houston, with interest at seven per cent. after six months, and without exchange. This was not an acceptance of the terms proposed. It does not matter that the difference of terms between the parties may not seem to be very material. If a diversity exists, that fact is enough. To make a contract, there must be a mutual assent. "The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter." If the answer, "either in words or effect, departs from the proposition, or varies the terms of the offer, or substitutes for the contract tendered one more satisfactory to the respondent," there is no assent and no contract. "If a proposition be accompanied with certain conditions or limitations, the acceptance must correspond to it exactly, for if any alteration be suggested, or any exception be made to its exact terms, the provisional acceptance becomes merely a new proposition, which also requires an acceptance." The court cannot undertake to say how much consequence the consignors may have attached to the condition of making the notes payable at the office of their confidential agents at Galveston, or what objection they might have to their being made payable at the office of C. Ennis & Co., at Houston. The contract of sale therefore was not consummated, and there consequently was no transfer of the property. It is wholly immaterial whether the consignors declined to accept because of the variation in the terms they had proposed, or because they had been informed of the imposition which had evidently been practised upon them, as to the means and ability of the purchaser. Their assent was necessary to the completion of the contract; without it there was no contract, from whatever cause it may have been withheld. They were at liberty to recede at any time before the acceptance of their proposition; and having done so, they had the right to resume the possession of their property.

4. What is Property.

Griffith v. Charlotte R. R. Co. 23 S. C. 25.

Griffith, as administrator of Hook, sues the railroad company for damages to the corpse of Hook, who had been murdered, and

whose corpse had been laid on the railroad track so that a train ran over it.

Held, that an administrator has no title to the dead body of his decedent and therefore can not maintain an action for mutilation.

Simpson, C. J.

The term property may be defined to be the interest which can be acquired in external objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in them, or over them. This interest may be absolute, or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others. It is limited or qualified when the control acquired falls short of the absolute, which may be the case sometimes for several reasons not necessary to be adverted to here. Now, to entitle one to bring action for an injury to any specific object or thing, he must have a property therein of the one kind or the other mentioned. If he has no such property, he can have no cause of action, however flagrant or reprehensible the act complained of may be.

Can property, either absolute or qualified, be acquired in a corpse, and especially as involved in the case under investigation, can such property be acquired by the administrator of the deceased? As to absolute property, "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes." "A dead body by law belongs to no one, and is therefore under the protection of the public." "There can be no property in a person deceased, consequently larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud."

5. What are Goods.

Vawter v. Griffin. 40 Ind. 593.

Griffin and Williams made a note to Moore which was afterwards assigned to Vawter, who sues on it. Moore at the time owed Williams a debt which Williams orally assigned to Griffin in connection with the transaction. In a suit on the note, Griffin insists that he has a right to set off the amount which it finally turned out that Moore owed Williams. The question is raised whether the agreement between Williams and Griffin was not in any event void as a sale of "goods" of the value of \$50 or more, and hence within the statute of frauds.

Held, that the term "goods" does not include choses in action; and that the oral agreement was valid.

Buskirk, J.

The solution of the question will depend upon the meaning to be attached to the word "goods." Is the word comprehensive enough to embrace promissory notes and things in action? A legislative construction has been placed upon the phrase "personal property" and the word "property." The word "property" includes personal and real property. The phrase "personal property" includes goods, chattels, evidences of debt, and things in action.

The phrase "personal property" is a much more comprehensive term to designate objects of ownership than the word "goods." The word "goods" is defined by Webster as follows: "Goods, n. pl. 1. Movables; household furniture. 2. Personal or movable estate, as horses, cattle, utensils, etc. 3. Wares; merchandise; commodities bought and sold by merchants and traders." The word is defined by Worcester as follows: "Goods, n. pl. 1. Movables; personal or movable estate; furniture; chattels; effects. 'All your goods, lands, tenements.' Shak. 2. Wares; freight; merchandise; commodities. The term 'goods' comprehends a person's furniture and other movables, or movable property; chattels, cattle, implements of husbandry, etc.; goods and chattels, personal estate and effects. Effects is a term nearly synonymous with goods, and includes lands, tenements, furniture, etc. The goods or merchandise of a trader; a manufacturer's wares; the commodities of a country."

The word "chose," and the phrases "choses in possession" and "choses in action," are defined as follows: "Chose (fr. thing): personal property. Choses in possession: personal things of which one has possession. Choses in action: personal things of which the owner has not the possession, but merely a right of action for their possession."

The phrase "chose in action" is defined to be a thing which a man has not the actual possession of, but which he has a right to demand by action, as a debt of demand due from another.

All the definitions of the word "goods" refer to things that are visible and in possession, while the definition of "chose in action" refers to something invisible, intangible, as a debt or demand or right of action.

We are very clearly of the opinion that contracts for the sale of evidences of debt and things in action are not within our statute of frauds.

6. What is Price.

The Madison Ave. Baptist Church v. The Baptist Church in Oliver St. 46 N. Y. 131.

The Madison Avenue Baptist Church seeks to recover possession of property claimed to have been sold without authority to the other Church. The question at issue turns upon the con-

struction of a statute authorizing the "sale" of property of religious corporations.

Held, that a sale requires a price.

Grover, J.

The inquiry is, whether the contemplated conveyance from the plaintiff to the defendant, upon the terms and consideration set out in the petition, would constitute a sale within the meaning of the eleventh section of the act. A sale is a transmutation of property from one man to another, in consideration of some price or recompense in value; as a contract for the transfer of property from one person to another for a valuable consideration; and, among the requisites to its validity, is mentioned the price paid or to be paid. [It is] an agreement by which one man gives a thing for a price in current money. This differs from a barter or exchange in this, that in the latter, the price, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. The term would embrace every transfer for a valuable consideration, whether paid in cash or other property. In case payable in the latter, the property to be received should be specified in the petition, so as to enable the court to determine whether the proposed contract is judicious on the part of the corporation. Tested by this construction, the arrangement set out in the petition was in no sense a sale of the property by the plaintiff to the defendant. There was no price whatever to be paid therefor. The plaintiff, as a corporation, was to derive no possible benefit as a consideration for the conveyance. True, the members of the plaintiff's church were to be received into, and become members of, the defendant's church, and the plaintiff's corporators were to become corporators of the defendant. This may be regarded as a benefit conferred upon those classes as individuals, but can in no sense be so to the plaintiff, regarded as a corporation. Indeed, the arrangement could only be made effectual by the dissolution of the plaintiff; and this result it was the manifest purpose of the arrangement to effect.

B. Sales Distinguished from Similar Transactions.

I. License.

Arnold v. North American Chemical Co. 232 Mass. 196.

The Chemical Company agreed with Arnold, a former stockholder in the corporation, that if it should sell its shoe filler business in Canada or any foreign country, Arnold should receive a certain share of the proceeds of the sale. The company afterwards issued licenses for the use of this filler to persons in Great

Britain and Germany for terms of five years. Arnold seeks to recover a share of the license fees on the theory that such transfers are included in the terms of his contract.

Held, that a license is to be distinguished from a sale.

Rugg, C. J.

The word "sale" has a well defined meaning. It is the transfer of property from one person to another for a consideration of value. The word implies ordinarily the passing from seller to buyer of the general and absolute title to property as distinguished from a special interest, a bailment, a license, a lease, a pawn or other limited right falling short of complete ownership. The distinction between a sale as a complete change of title and other transactions amounting merely to the acquisition of some particular property right is well established.

Plainly the contract between the defendant and the British corporation in form was not a sale. The decisive descriptive words used are "exclusive license." That means, considered abstractly, a privilege or authority granted to another to do that which he would not otherwise be justified in doing, by one who possesses and retains a superior right or power. As applied to a patent it signifies the assignment by the patentee to another of rights less in degree than an interest in the patent itself. The law, however, will not be bound by the form of the transaction, but giving due effect to all the words used will look to the substance of the matter in order to determine whether there has been a sale. Testing the contract in this way, it confers a license and is not the equivalent of a sale or absolute transfer. It was limited in point of time. The entire title to the patents in Great Britain was not transferred to the British Corporation and hence there was no sale. The effect of the written instruments was to grant a license and not to make a complete transfer.

2. Bailment and Conditional Sale.

Union Stock-Yards and Transit Co. v. Western Land and Cattle Co., Ltd. 59 Fed. 49.

The Cattle Company made certain contracts with Daniel Hall whereby Hall agreed to receive and transport cattle belonging to the Company, feed them, be liable for losses and take as compensation all that should be received over a certain price per head, upon their sale by the Company. The cattle were mortgaged without authority by Hall to Hall, Greer & Co., who seized them and deposited them with the Union Stock-Yards Company. The Cattle Company seeks the return of these cattle, claiming that the transaction with Hall was not a sale but a bailment.

Held, that the transaction was a bailment, not a conditional sale.

Jenkins, Cir. J.

If the contract constitutes a bailment of personal property, and Hall was an agister, the judgment [of the court below for the Cattle Company] is clearly right. If, on the other hand, the contract should be construed as a conditional sale of personal property, reserving the title in the vendor until payment of the purchase price, then, by force of the statutes of Missouri, the contract is void as to Hall, Greer & Co., who, for the purposes of this case, as presented to us, must be deemed purchasers for value, without notice of the rights of the Cattle Company. The purpose of that statute is to avoid, as against subsequent purchasers in good faith, and creditors, all secret liens upon personal property.

It is of the essence of a contract of sale that there should be a buyer and a seller; a price to be given and taken; an agreement to pay, and an agreement to receive. "Sale" is a word of precise legal import. "It means, at all times, a contract between parties to give and to pass rights of property for money, which the buyer pays, or promises to pay, to the seller, for the thing bought and sold." A conditional sale implies the delivery to the purchaser of the subject matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. The border line is somewhat obscure, at times. The difficulty must be solved by the ascertainment of the real intent of the contracting parties, as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which the two may be distinguished. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be a payment for the use of the thing let or bailed. If service is to be rendered the subject matter of the bailment, there must be compensation for the service, unless the bailment be a mandate. In a contract of conditional sale the agreement to pay the purchase price may be masked so as to give it the appearance of an agreement to pay for use. In such case the court must ascertain the real intention of the contracting parties from the whole agreement, read in the light of the surrounding circumstances.

We must therefore subject the provisions of the contracts in question to the tests declared, to ascertain the real design of the contracting parties; to determine whether, under them, the cattle

were bailed, or conditionally sold. Careful scrutiny of the agreements, in the light of legal principles, compels us to the conviction that they must be held to be contracts of bailment.

3. Return of Identical Goods in Bailment.

Laffin and Rand Powder Company v. Burkhardt. 97 U. S. 110.

The Powder Company made a contract with Dittmar whereby Dittmar under a patented process owned by him, manufactured a certain explosive with materials advanced by the Powder Company and upon credit furnished by it. The money and materials were to be charged to Dittmar against the manufactured goods, and the parties were to divide the profits. Burkhardt, who held a judgment against Dittmar, seized on execution goods which had been manufactured in part from materials furnished by the Powder Company, which now seeks to recover the goods from Burkhardt.

Held, that in order that a bailment shall exist, the identical goods must be returned.

Hunt, J.

The plaintiff in error contends that the present is the case of a bailment, and not of a sale or a loan of the goods and money to Dittmar. It is contended that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer.

The materials to be sent were to be delivered to Dittmar, to be in his actual possession and under his absolute control. We see nothing requiring that the identical acids sent should be used in the manufacture of the explosives, and nothing to prevent an exchange by Dittmar for other materials, if he found any of the articles to be unsuitable, or if he found that he had too much of one kind and too little of another, acting honestly in the interests of both parties. The case is quite different from the single mechanical transaction of turning a specific set of logs into boards or a specific lot of wheat into flour, where there is no room for judgment or discretion.

The Powder Company relied upon the general result. The delivery of the material to Dittmar did not create a bailment.

4. Bailment of Goods Mixed with Other Goods.

Rice v. Nixon, 97 Ind. 97.

Nixon, a warehouseman, received wheat from the plaintiff, which, as his custom was, he deposited in his warehouse with other wheat. All the wheat in the warehouse was destroyed by fire. The plaintiff contends that the contract was one of sale and that she is entitled to the value of the grain so destroyed.

Held, that grain deposited in a warehouse represents a bailment, not a sale.

Elliott, C. J.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own. "If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the original value of his property, he must have the whole." This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman. There is, however, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common.

The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and

not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as a matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him.

It has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

5. Bailment with Option to Buy.

Frye v. Burdick. 67 Me. 408.

Frye, who had a government contract to carry the mail, entered into a written agreement with Burdick whereby Burdick agreed to carry the mail and took over horses belonging to Frye, undertaking to return them in good order at the end of two years unless paid for. The horses were abused and the wagons injured. Frye sues for damages for injury to them.

Held, that the transaction in reference to the horses constituted a bailment and that the bailor could sue for damages sustained by breach of its terms.

Appleton, C. J.

The law seems well settled that where one receives goods and chattels of another on a contract, by which he has a right to return them or pay a stipulated price for them, the property passes and he is regarded as the purchaser.

And in all the cases to which we have been referred, the contract was in the alternative, to return or pay the stipulated price.

In the present case the defendant received horses and other property of the plaintiff, for which he and the other defendant gave the following receipt: "Dexter, July 1, 1873. This day received of W. A. Frye two black horses, called Hiram and Indian, two bay horses, called Fairbrother and Jenkins, two two-seated wagons, two single harnesses, the above property valued at eight hundred dollars, which I agree to keep in good order and condition and return the same to W. A. Frye, at the end of two years, unless paid for. (Signed.) Joseph U. Burdick, V. Mason Burdick, surety."

Here no bargain for the sale of property is shown. The property is "received" not "bought." No price for each or all of the articles is agreed upon. They are only valued. There is no promise to pay.

The contract between the parties embodied in the writings was one of bailment, not of sale. It is not in the alternative. It is to

keep the property in good order and condition and return the same at a stipulated time "unless paid for." The principal in the contract is not absolved from his promise to keep and return except upon payment. He is bound to return the articles received unless paid for. The principal has no title unless on payment. V. Mason Burdick is surety—for what? That the property received shall be kept in good order and condition and returned unless paid for. The promise then to return the goods is obligatory unless something else is done, that is, unless it is paid for. The surety is not liable for the price, for none has been made. He is surety only that the contract should be performed, and he is not to be relieved except upon its performance. The contract contains no words of sale.

There can be no reasonable doubt as to the meaning of the parties. The one did not intend to part with his title. The other did not suppose he was acquiring one. If the title to the property has changed, the change has taken place without the knowledge or expectation of either party and against the intention of both. But no such change has taken place. The contract to safely keep and return was explicit. The defendants cannot be relieved from their liability, unless upon payment. But payment has not been made. The contract, then, is in full force to keep in good order and condition and return, and the defendants are liable in damages for its violation.

6. Conditional Sale.

Harkness v. Russell. 118 U. S. 663.

Russell & Company sold Phelan and Ferguson engines, boilers, and saw mills under a contract whereby the title to the property should not pass until a note given for it was paid. Subsequently, Phelan and Ferguson sold the property to the defendant Harkness. Russell & Company now sue to recover its value from Harkness.

Held, that the contract was a conditional sale and not a mortgage.

Bradley, J.

The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase-money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. Two rules are laid down as established: (1) That

where by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property.

(2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, &c., this is a condition precedent to the transfer of the property. And it is subsequently added, that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled." To the two formulated rules [is added] a third rule, which is supported by many authorities. to wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

In this country many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 545-547, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property even from one who has purchased from his vendee in good faith, and without notice; [the] opinion [commencing] in the following terms:

"It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a bona fide purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such

is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

7. Pledge.

Trenholm v. Miles. 102 Miss. 835.

Mrs. Miles, the defendant, leased land to King, retaining a lien on the crops for the rent. Afterwards, King conveyed all his crops to her under a deed of trust, authorizing her to market and sell them, which she did. Trenholm, as trustee in bankruptcy of the estate of King, attempts to recover money from the defendant on the theory that she received a preference which would be voidable under the bankruptcy act.

Held, that the transaction constituted a sale and not a pledge.

Reed, J.

There is nothing unusual about the transaction between C. L. King and appellee. It is an ordinary business affair, quite common in this state in the dealings between planters and tenants. It is contended by appellant that the understanding between appellee and C. L. King was that she should sell the cotton in New Orleans and apply the proceeds thereof to the settlement of the amount due for rent and supplies amounted to a pledge, and that the pledge was substituted for the liens held by appellee as landlord and under her deed of trust, and that such pledge was not recognized under the laws of Louisiana, and that, therefore, appellee lost all liens which she had on the cotton when it crossed the state line from Mississippi into Louisiana.

"A pledge is a transfer of personal property as a security for a debt or other obligation":—"A deposit of goods, redeemable on certain terms":—"A lien created by the owner of personal property by the mere delivery of it to another, upon an express or implied understanding that it shall be retained as security for an existing or future debt." An element necessary to constitute a contract of pledge [is] that the legal title to the pledged property must remain in the pledgor. "A pledge may be defined to be a deposit of personal property as security with an implied power of sale upon default."

"A sale is to be distinguished from a pledge, which is a bailment to secure the payment of a debt or the performance of some other act; the pledgee acquiring only a special property in the thing pledged. When personal property is delivered as security, the transaction is a pledge. But if goods are delivered by a debtor to his creditor in payment of the debt, the transaction has the effect of a

sale; and the same is true if goods are delivered by the debtor to the creditor to be sold, and the proceeds applied on the debt, with a return of the surplus. A transaction on its face a sale will not be converted into a pledge by a mere agreement to resell."

It will be noted in the present case that the appellee had all the liens and security she could ask for on the cotton, and that this was recognized by C. L. King. Under the definition that a pledge is a transfer of the personal property as security, is there any reason to decide that King transferred to Mrs. Miles the cotton as security? We conclude that the facts agreed upon, which include the provisions of the lease contract and the deed of trust, show that the cotton was not delivered as security. Is it not clear that the cotton was delivered to appellee, the holder of the liens, at Milestone, in Mississippi, in payment and satisfaction of the amounts due her and secured by the liens she held?

Another requisite in a pledge is the right to redeem the property deposited. Did King have any such right in this case? Surely the statement of facts shows that he did not. The cotton was delivered to appellee, who had the right to receive it.

8. Chattel Mortgage.

Zimmerle v. Childers. 67 Oreg. 465.

Childers, a sheriff, seized as property of the Grande Ronde Orchard Company, hay and oats which had previously been conveyed to Zimmerle by a bill of sale to secure a debt which the corporation owed him. Zimmerle was treasurer of the corporation at the time. Zimmerle sues to recover the value of the property from the sheriff.

Held, that a pretended sale may be shown to be in reality a chattel mortgage, which must be recorded in order to be good against other attaching creditors.

Ramsey, J.

If this bill of sale was intended at the time that it was executed to operate as security for the payment of a debt owing by the vendor to the vendee, it is, in effect, a chattel mortgage. "In determining whether a transaction is a sale or a chattel mortgage, the court will take into consideration the intention of the parties, in view of all the circumstances."

"A bill of sale, although absolute on its face, if taken as security for a debt, is in effect a chattel mortgage, and, as to the immediate parties, thereto, will in equity be treated as such. But, on the other hand, the general principle is that where the transaction clearly shows that the entire interest in the property is conveyed without reservation, it will be treated as an absolute sale."

"There is perhaps no conclusive single test by which it may

be determined that any transaction may be denominated or legally characterized as a mortgage, as distinguished from a conditional sale. The primary inquiry may be said to be the intention of the parties, and this may be determined, not alone by the instrument which forms the basis of the transaction, but by the attendant and surrounding circumstances, and the conditions under which it was delivered and designed to become effective."

In this case if it was the intention of the parties at the time the instrument was executed to convey to the vendee the entire interest in the property without reservation, said instrument was a bill of sale; but, if it was the intention of the vendor to convey the property to the plaintiff to secure the debt which the company owed him, with the agreement that he was to sell the property and to credit the amount received for it on the debt, and that no credit was to be made on the debt until the plaintiff received something for the sale of the property, such instrument was in effect a chattel mortgage. It is largely a matter of intention, to be determined by the facts and circumstances surrounding the transaction. But, in cases of doubt, courts are inclined to construe the transaction as a mortgage.

In this state, in an action at law, a bill of sale absolute on its face may be shown to be a chattel mortgage.

If a bill of sale is made to secure a debt, it is a chattel mortgage, and, if executed, witnessed, acknowledged and certified as a chattel mortgage is required to be, it is entitled to be recorded as a chattel mortgage.

9. Barter.

Hartwig v. Rushing. 93 Ore. 6.

A statute in Oregon (as in many other states) prohibits the sale of goods in bulk unless creditors are notified. George Hartwig transferred his entire stock in trade to Rushing in exchange for land without giving the required notices. The plaintiff, William H. Hartwig, a judgment creditor of George Hartwig, contends that the transaction amounted to a sale within the terms of the statute, of which he now seeks to take advantage in order to establish his right to the proceeds of the goods.

Held, that the transaction was a "sale" within the meaning of the bulk sales law.

Harris, J.

It is contended that the statute only applies to a "sale" as distinguished from a "barter or exchange" of personal property and that the bulk sales law applies only to transfers "for cash or on credit;" that the transfer of the store to Rushing was not a sale

"for cash or on credit;" and that therefore the transaction was not in violation of the bulk sales law.

In legal nomenclature the term "sale" is used in a restricted and also in a broad sense. The controversy presented by this appeal does not require an attempt to determine whether the word "sale" when technically and exactly defined is confined to the restricted sense or comprehends the broad meaning. When employed in its restricted sense it means a transfer of title for money. There are numerous transactions where the word "sale" must, because of the very nature of the business, be given its restricted meaning, as, for example, powers of attorney and the like. When used in its broad sense the term "sale" includes the transfer of personal property for a consideration estimated in money. There are many authorities which define a sale of personal property as the transfer of a chattel from the seller to the buyer for a price, or a consideration estimated in money; and consequently under that definition if property is taken at a fixed money price, the transfer is a sale whether the fixed money price is paid in cash or in goods. A barter or exchange of properties occurs where one article is exchanged for another, no price in money being fixed upon either.

The word "sale" is sometimes used in what may be termed its popular sense, and when so used signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid; in the interpretation of statutes the word "sale" is often given its popular signification and "held to include barter and any transfer of personal property for a valuable consideration."

16. Contract for Work, Labor and Materials.

Cooke v. Millard. 65 N. Y. 352.

The defendants ordered from Cooke's firm over \$900 worth of lumber which had to be dressed and cut to the required size. They selected the lumber which they decided to have manufactured, and gave instructions as to shipment. When the lumber was ready for delivery, but before it was shipped, it was destroyed by an accidental fire. The plaintiffs bring an action for the price of the lumber, to which the statute of frauds is pleaded.

Held, that under the New York rule, an agreement for the sale of an article in existence, but upon which the vendor is to do some work to adapt it to the uses of the vendee, is a sale.

Dwight, C.

The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being

included in the price, in fact a contract for work and labor and not one of sale, and, accordingly, not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels, or things in action" for the price of fifty dollars or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute, "goods, wares and merchandise." It will be assumed, however, in this discussion, that they are equivalent.

There are, at least, three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus, if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor as the whole result of his efforts would not produce a chattel which could be the subject of sale by him. If, on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled. The leading case upon this point is *Lee v. Griffin*, 1 *Best & Smith* 272. The court held this to be the sale of a chattel within the statute of frauds. "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, at the time stipulated for delivery, be regarded as "goods, wares and merchandise," in the sense of being generally marketable commodities, made by the manufacturer. In that respect, it agrees with the English rule. The test is not the nonexistence of the commodity at the time of the bargain. It is, rather, whether the manufacturer produces the article in the general course of his business or as the result of a special order. In [a] very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business

manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Under this rule, it was held in *Gardner v. Joy*, 9 Met. 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand, in *Goddard v. Binney*, 115 Mass. 450, the contract with a carriage manufacturer was that he should make a buggy for the person ordering it, that the color of the lining should be drab, and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be contract for sale within the statute.

The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word sale. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. The contrast between *Parson v. Loucks*, 48 N. Y. 17, in this state, on the one hand, and *Lee v. Griffin* (*supra*), in England on the other is, that in the former case, the word sale refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel, it is enough, according to the English rule.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*. It is at once so philosophical, and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court, however, in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state is, that when the chattel is in existence, so as not to be governed by *Parsons v. Loucks* (*supra*), the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and nonexisting chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chat-

tels are in existence or not. The mass of the cases will, however, readily be classified. If, on further discussion, the rule in *Lee v. Griffin* should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

C. Statute of Frauds.

1. Application in General to Contracts of Sale.

Bird v. Munroe. 66 Me. 337.

On March 2, Munroe orally agreed to buy from Bird and Company 5000 tons of ice. On March 10, Munroe temporarily prevented delivery. On March 24, the parties put their previous verbal contract into writing and on the same day the plaintiffs sold the ice to another party, retaining their claim for damages against Munroe, which they now try to enforce by suit.

Held, that a previous oral contract reduced to writing is enforceable although the writing is not made at the time of the original contract.

Peters, J.

The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it? We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in

earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. "The instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J., "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought.

A distinction is attempted to be set up between the meaning to be given to [that portion of the statute] where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different

hands. Although our statute uses the words "no contract shall be valid," our previous statute used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised without any legislative intent to make an alteration in the sense of the section. The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof.

2. Nature of Memorandum Required.

Brown v. Whipple. 58 N. H. 229.

Whipple wrote Brown asking for terms on twenty thousand feet of maple planking. Brown gave his terms orally and the parties afterwards made a memorandum of the transaction signed by Whipple only. Brown sues Whipple for failure to take delivery of the lumber.

Held, that while several writings may constitute the memorandum, all the essential terms of the contract must be expressed therein.

Doe, C. J.

The general rule is, that collateral papers, adduced to supply the defect of signature of a written agreement, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. A defective reference can no more be cured by parol than any other defective part of the memorandum.

The writing, called in this case the defendant's memorandum, is insufficient because, if it is signed by the defendant, and if it shows that he bought lumber of some one, it does not show of whom he bought it. The defendant's letter of inquiry is insufficient because it does not show that he bought or agreed to buy anything of anybody. If the necessary memorandum were described in the statute as a scintilla of proof of the essentials of the bargain, and if the question were whether, in fact, the plaintiff is the person with whom the defendant contracted, one question of law would be, whether the defendant's memorandum and letter (with or without other evidence) are competent for the consideration of a jury. But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not

stated in the writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them. Taken together, with all the meaning that is expressed, and all that can be implied by the most strained construction in favor of the plaintiff, the defendant's memorandum and letter state that at some time the defendant agreed to buy of somebody 15,000 feet of clear rock maple boards of certain dimensions, to be delivered at the railroad track, at \$20 a thousand; and that, on the 21st day of December, 1867, the defendant inquired of the plaintiff, by letter, whether he could get for the defendant 20,000 feet of the best maple lumber the coming winter, saw it in the winter or spring, and deliver it at the depot at the plaintiff's place the next July—and at what price the plaintiff would do this. We do not think the legal import of this statement is that the plaintiff is the person with whom the defendant contracted.

A memorandum (consisting of one or more writings) may be read, like other documents, in the light of the circumstances in which it was written, for the explanation of its latent ambiguities, and the application of its terms to the persons and things sufficiently described in it. But this rule does not admit parol evidence to supply an essential part of the contract, the omission of which is patent on the face of the memorandum. And the inequitable operation of the statute is not to be avoided by a narrow construction of the law, or a liberal construction of the memorandum. Arguments from inconvenience and injustice sometimes tend to show the lawmakers' intention. But there is no reason to fear that, in this country as well as in England, the favor with which some statutes, and the dislike with which others, have been regarded by courts, have enlarged the distinction between strict and loose construction, without reference to the legislative intent, and introduced a variable standard that exposes the province of the legislature to judicial invasion.

3. What the Memorandum Must Contain.

Reigart v. Manufacturers Coal and Coke Company. 217 Mo. 142.

The Manufacturers Coal and Coke Company agreed to sell coal at a certain price to Reigart for use in his business for a period of five years. No consideration was specified in the memorandum, and upon a suit by Reigart for failure to deliver coal under the contract, the defense is made that, as no consideration was specified, the memorandum does not satisfy the statute of frauds.

Held, that the memorandum must, in Missouri, state the consideration and must contain the terms of the contract.

Woodson, J.

The word "contract" as used in the statute includes all of the terms and provisions of the agreement entered into between the parties, and not a part of them only, but all of them. If that statute had provided, or if it was the meaning thereof, that only a part of the terms of the contract should be reduced to writing and not all of them, then the statute would be without force or meaning, for the reason that at common law the same thing could have been done, that is, as before stated, at common law if the contract was incomplete on its face, oral evidence was admissible to supply the omissions.

The statute was not declaratory of the common law, but was highly remedial, intending to prevent fraud and perjury by changing the common law in that regard, by requiring that all of the terms of the contract should be reduced to writing before an action could be maintained thereon. And what has been here said is reinforced and made clearer by reverting to the common law, which conclusively presumes that the written contract is the receptacle for and contains all the terms of the agreement, and which prevents the introduction of parol evidence in any manner to change, add to or take from the written contract, except where the written contract itself showed upon its face that parts of it were omitted therefrom.

The legislature, by this statute, intended to wipe out that exception and prevent an action from being maintained, even though the omission appeared on the face of the contract. That was its very object and purpose and none other.

It necessarily follows that the contract price and the consideration of the contract must be stated in the written contract along with all the other terms thereof, and it cannot be shown by parol evidence.

I am fully aware and not unmindful of the fact that some of the cases hold that under the statute of frauds it is not necessary that the consideration of the agreement should be stated in writing; nor am I unmindful that some of the opinions so holding were written by some of the greatest jurists and brightest minds that ever adorned this bench.

Notwithstanding the great ability and learning of all of these distinguished jurists, I respectfully submit that they, and each of them, either overlooked the provision of the statute before quoted, and the evils that existed at common law which the statute was intended to remedy, and applied the common law rule instead of the statute; or, if the statute was considered in those cases, then they so interpreted it as to make it declaratory of the common law in its fullest sense without changing a word or dotting an "i," and thereby left existing in full force the very evils the statute was intended to abolish.

4. What Constitutes Acceptance and Receipt.

Rodgers v. Phillips. 40 N. Y. 519.

Rodgers and Luther orally agreed to sell Phillips and Oakley coal to the value of about \$650. They delivered the coal to a common carrier and forwarded a bill of lading. The boat on which the coal was loaded sank and the coal was a total loss. The defendants contend that there was no such acceptance and receipt by them as to make them liable for the price of the coal.

Held, that delivery to a carrier does not constitute acceptance and receipt, unless the carrier is designated by the purchaser.

Daniels, J.

The disposition which should now be made of the controversy will depend entirely upon the sufficiency of the evidence given upon the trial to establish the fact that the coal had been delivered to and accepted by the defendants. The contract for the sale of it was within the statute of frauds; and on that account, as it was not in writing, and nothing had been paid upon it, by the direct terms of that statute it was void. Although the plaintiffs did perform all that would have been requisite to transfer the title to the coal to the purchasers, under the well established rule of the common law, it does not follow that what they did would be attended with the same result under the rule prescribed by the statute. Where a valid and subsisting contract for the sale of personal property may be shown to exist, and by its terms the property is to be shipped by the vendor to the vendee, then a delivery of it to a responsible carrier for the vendee, to be carried and delivered to him, will ordinarily transfer the title to the vendee and place the property at his risk. But this rule requires that the contract between the parties shall be at the time legal, valid and subsisting. It does not include cases like the present one, where, on account of a failure to comply with the positive rule prescribed by the statute, the contract is void, and must remain so until some act has been performed that will have the effect of giving it legal validity. In cases like the present one, it is the statute, and not the common law, that has provided the mode by which the previously void agreement could be rendered legal and binding upon the parties. And that mode must be pursued; otherwise, the agreement must remain without any binding force upon either of the parties. Until that may be done, the contract must remain entirely optional on the part of each of the parties. Even if the vendors elected to perform it, and deliver the property precisely as they had agreed to, it was still optional with the vendees whether they would receive it or not. And even if the former went so far as to actually deliver it, the vendees still had their election to either receive or refuse it.

This statute is in substance the same as the previously exist-

ing English statute, and they have both been regarded as identical in the change they have produced in the common law rule.

By the construction they have received, and which their language manifestly required, a mere delivery of the property contracted to be sold by the terms of the void contract, has been held to be insufficient to vest the title to it in, or place it at the risk of, the vendee. But, beyond that, it became necessary under the rule adopted by the statute that some part of the property should not only be delivered and received by the vendee, but that it should also be accepted by him. This acceptance of it involved something more than the act of the vendor in the delivery. It required that the vendee should also act, and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. He must receive and retain the articles delivered, intending thereby to assume the title to them to constitute the acceptance mentioned in the statute; when that has been done, then, for the first time, the void contract becomes valid and obligatory upon the parties to it.

The question in this case, therefore, is whether such an acceptance of the coal by the defendants was shown as placed it at their risk at the time when it was lost by the sinking of the vessel it was laden upon. And, for the purpose of considering and deciding it, this case must be distinguished from those where the property contracted to be sold was delivered to a particular carrier designated and selected by the vendee for the purpose of receiving and accepting it. For, in those cases, the carrier by the act of the vendee became his agent, and bound him by the receipt and acceptance of the property. This case differs from those in the circumstance that no such designation or selection was made by the defendants. The carrier to whom the property was delivered to be carried to the defendants was selected by the plaintiffs. The defendants in no manner authorized or participated in it, beyond the void authority conferred by the terms of their void contract. Being void, as it was, the plaintiffs could not avail themselves of its terms, for the purpose of binding or concluding the defendants by what they did under it. Whatever they did towards the performance of the contract they did for themselves, and at their own risk, until the defendants elected to change the risk, and did change it, by the acceptance of the property mentioned in the statute; what the evidence showed was a selection of the carrier by the plaintiffs, and a delivering of the coal to him, not an acceptance of it by the defendants. That acceptance required some act on the part of the vendees to constitute it, performed after the coal had been separated from the mass and placed in such a condition as rendered that particular quantity capable of being accepted by the defendants. The evidence not only failed to show the performance of any act of acceptance on the part of the defendants, but beyond that, it appeared that they did not hear of its shipment until the vessel it was laden upon had

sunk to the bottom of the Schuylkill. There was nothing, therefore, in the case from which the defendants could be deemed to have accepted the coal at that time. It consequently continued to be the plaintiffs' property, remaining at their risk, and it was their loss when the vessel sunk, after it had been laden on board of her. And if the carrier became liable for the loss, his liability was to the plaintiffs, not to the defendants. That a mere delivery of property to a carrier selected to receive and carry it by the vendors, will in no legal sense constitute an acceptance of it by the vendee, and for that reason, exclude the case from the operation of the statute, has been distinctly held in several adjudged and well considered decisions.

5. Constructive Acceptance and Receipt.

Beedy v. Braman Wooden Ware Co. 108 Me. 200.

Beedy agreed to sell the defendant five tons of hay at his barn at \$17 per ton. Pursuant to the agreement, he took five tons of hay out of his barn and placed it where the defendant could easily remove it. Shortly afterward, the defendant discontinued business, refused to take the hay, and requested Beedy to see if he could not dispose of it to Beal, who declined to purchase. Beedy sues for the price of the hay. The defendant pleads the statute of frauds, claiming that there was no acceptance and receipt of the hay.

Held, that if the defendant exercised powers of ownership over the articles sold, that constitutes acceptance and receipt.

Bird, J.

There may be a complete delivery at common law without either receipt or acceptance under the statute. The former is the act of the vendor, while receipt, which affects the possession, and acceptance, which affects the title, are the acts of the purchaser and both receipt and acceptance are essential. Nor can such receipt and acceptance be shown by words alone, where such words are part of the alleged oral bargain and sale. But receipt and acceptance need not be contemporaneous with the alleged contract, if made in pursuance of it, nor need they be simultaneous. The former may precede or follow the latter. No act of the vendor alone can be effective to make delivery, without receipt and acceptance, take the case out of the statute. If the vendee does any act to the goods, of wrong if he be not their owner, and of right if he be their owner, the doing of the act is evidence that he has accepted them.

In the case at bar, the alleged bargain and sale was not of certain specified goods selected and accepted by the purchaser or its agent but of a certain quantity of goods to be selected by the vendors from a larger mass. The separation of the hay alleged to have been purchased and its deposit outside the barn were the acts of the

vendors. Although, from the evidence as to the manner of payment and the subsequent relation of the vendors to the property, we think no lien for the price was retained, it is needless to state that neither receipt nor acceptance can be found from such acts of the vendors.

It is uncontradicted that defendant directed its agent to offer the hay for sale to a certain party who refused the offer. Clearly constructive acceptance and receipt may arise from dealing with the goods as owner, as by the purchaser reselling or pledging the goods. The first case of this character is one where, a stack of hay being sold by parol to the defendant, he, without paying for it or removing it, resold a part of it to another who took it away. And Kenyon, J., speaking for the Court of King's Bench says, "Here the defendant dealt with the commodity afterwards, as if it were in his actual possession, for he sold part of it to another person." A resale is evidence of a constructive receipt as well as of constructive acceptance.

In reason we fail to distinguish between a sale and an offer to sell. There is no difference in so far as the act of the alleged purchaser is concerned. He does no more than offer the goods in either case. Whether, when he has made the offer, his offer becomes a sale in fact depends upon the action of a party who bears no relation to the parties, *inter se*, to the original alleged sale. In either case his act is equally an assertion of ownership.

We conclude that upon the uncontradicted evidence we must find such an acceptance and receipt of the hay as satisfies the requirements of the statute of frauds.

6. Necessity of Act Indicative of Acceptance and Receipt.

Shindler v. Houston. 1 N. Y. 261.

Houston owned maple lumber which he had brought to Troy on a boat and had piled on the dock apart from any other lumber. Soon afterward, Shindler agreed to buy it from him for \$52 and Houston said to him, "The lumber is yours." Later Shindler refused to take the lumber and Houston sues for the price.

Held, that acceptance and receipt of part of the goods sold necessitates an actual delivery in order to take the case out of the statute.

Bronson, J.

If we assume the sale was in all other respects complete, the difficulty still remains that there was no delivery of the goods. Nothing was done. There was nothing but mere words; and the statute plainly requires something more; it calls for acts. A writing must be made, part of the purchase money must be paid, or the buyer must accept and receive part of the goods. Mere words of

contract, unaccompanied by any act, cannot amount to a delivery. To hold otherwise would be repealing the statute.

There may be a delivery without handling the property, or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property, and puts it in the power of the buyer; as by delivering the key of the warehouse in which the goods are deposited, or directing a bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner. In such case there is, in addition to the words of bargain, an act by which the dominion over the goods is transferred from the seller to the buyer. Here there was no delivery either actual or symbolical.

7. Acceptance Must Be Under the Contract.

Atherton v. Newhall. 123 Mass. 141.

Newhall called at the plaintiffs' store in Boston and said he would take those hides which were adapted to his purpose out of a lot of 800. After he had gone, over 600 of these were set aside, weighed and marked with his name. An expressman delivered 90 of the 600 hides. Immediately thereafter, the undelivered leather was destroyed in the Great Fire. Newhall at once notified the plaintiffs that he would take only those hides actually delivered.

Held, that according to the Massachusetts rule, although a part of the goods purchased may be accepted and received, they must be accepted as a part of the contract in order to take the entire contract out of the operation of the statute of frauds.

Gray, C. J.

It is unnecessary to consider whether there was a sufficient delivery to complete the sale, because it is quite clear, upon the authorities, that there was no such acceptance and receipt of part of the goods as would satisfy the statute of frauds. Such acceptance must be by the buyer himself, or by some one authorized to accept in his behalf. The acts of the buyer on Saturday did not constitute such an acceptance, because, according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were not then set apart by themselves, but formed part of a large pile from which they were afterwards to be selected by the seller. The receipt of part of the leather by the expressman did not constitute such an acceptance, because he was not authorized to accept so as to bind the buyer. The acceptance by the buyer on Monday of the part brought by the expressman was not sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the

contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received.

8. Amount Received Not Material.

Garfield v. Paris, 96 U. S. 557.

Paris, Allen & Company sold Garfield, one of the defendants, about \$4,000 worth of liquor in accordance with negotiations between the parties in New York. While the defendants were in New York, labels for the bottles were delivered to them. The plaintiffs contend that this took the case out of the statute of frauds as it constituted acceptance and receipt of part of the goods sold.

Held, that the amount of goods received and accepted is not material.

Clifford, J.

Such a contract must be in writing, or there must be some note or memorandum of the same to be subscribed by the party to be charged: but the statute concedes that the party becomes liable for the whole amount of the goods, if he accepts and receives part of the same, or the evidences, or some of them, of such things in action; and the authorities agree that, where the question is whether the contract has been fulfilled, it is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold, in order that the contract may be held to be good, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract.

"Accept and receive" are the words of the statute in question; but the law is well settled, that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute.

Questions of the kind are undoubtedly for the jury; and it is well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts, and declarations of the purchaser may be given in evidence for that purpose; the vendee of goods may so deal with a bill of lading as to afford evidence of the receipt and acceptance of the goods therein described.

Where goods are purchased in several parcels, to be paid for at a future day, the whole, within the meaning of the statute of frauds, constitutes but one contract, and the delivery of part to the purchaser is sufficient to take the case out of the operation of the statute of frauds.

Apply the finding of the jury in this case to the conceded facts,

and it shows that the defendants were in the situation of a purchaser who goes to a store and buys different articles, at separate prices for each article, under an agreement for a credit, as in this case, accepting a part, but leaving the bulk to be forwarded by public conveyance. Frequent cases of the kind occur; and it is well settled law that the delivery of a part of the articles so purchased, without any objection at the time as to the delivery, is sufficient to take the case out of the statute of frauds as to the whole amount of the goods.

The delivery in such a case, in order that it may have that effect, must be made in pursuance of the contract, the question whether it was so made or not being one for the jury; but if they find that question in the affirmative, then it follows that the case is taken out of the statute of frauds.

Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole; and the acceptance may either precede the reception of the article, or may accompany their reception.

9. What Constitutes Part Payment.

Jennings v. Dunham. 60 Mo. App. 635.

Jennings & Silvey contracted to sell Dunham a large number of hogs. Each of the parties put \$50 into the hands of a third party as a forfeit to guarantee performance of the contract. Dunham refused to take the hogs and the plaintiffs now sue for damages arising from his failure to do so.

Held, that the posting of a forfeit is not the same as part payment.

Ellison, J.

The first question presented relates to the statute of frauds. Our statute, section 5187, Revised Statutes, 1889, provides that no sale of personal property of the price of \$30 or more, shall be valid, unless the buyer accept and receive a part of the property, "or give something in earnest to bind the bargain, or in part payment," or unless some written memorandum be made. There was no delivery of any part of the hogs at the time of making the contract, nor was there any written memorandum of the sale; and the question arising on the evidence is, was there a part payment? It was shown that plaintiffs and defendant, at the making of the contract, each placed the sum of \$50 in the hands of a third party, the plaintiffs' theory at the trial being that the sum put up by defendant was to be a part payment; while on the other hand there was evidence in defendant's behalf tending strongly to prove that each party respectively put up these sums as a "forfeit," so that the party failing to perform his contract should forfeit the amount put up by such party; the party not in default should receive the whole sum put up. The

trial court instructed the jury that, if the money was placed in the hands of a third party as money to be forfeited by the defaulting party, it was not a payment and the contract was invalid. A literal reading of the statute undoubtedly makes a distinction between something which is given in earnest to bind the bargain, and that which is given in part payment. Originally this "earnest" was not necessarily a part payment. It was a custom under the common law, and seems also to have been a custom in other countries than England to give something to bind a bargain. In some countries some act was performed. One species of earnest in the Roman law was a payment of a sum which if the sale was carried out was to be credited on the price, but which carried the understanding that it was forfeit money if the sale was not completed by the buyer; and if the contract was not performed by the seller, he was to return to the buyer the money advanced together with a like sum as a forfeit on his part. Whether a sum which is termed forfeit money was ever a species of earnest by the common law need not now be investigated, since it has ceased to be of practical importance. It is now considered that giving something in earnest to bind the bargain, and giving something in payment mean the same thing; that is, a part payment of the price. So, while in some countries in olden times, "earnest to bind the bargain" might consist of forfeit money, it is not so now. In modern times, earnest must be a part payment of the price. And, where the parties to a contract put up a sum of money to be forfeited to the nondefaulting party, it is not a part payment, and therefore does not take the contract out of the statute of frauds.

10. Necessity of Actual Payment.

Dow v. Worthen. 37 Vt. 108.

Dow bought poultry from Hatch & Company for Worthen, agreeing with Hatch that a debt of \$75 due Hatch from Dow should be extinguished by being applied as present part payment for the poultry. Worthen refused to accept the poultry, claiming that the sale was within the statute of frauds and that Dow had not entered into a binding agreement. The question arises whether this agreement constituted a proper part payment in order to take the case out of the statute of frauds.

Held, that part payment, as contemplated by the statute of frauds, does not require the physical transfer of money.

Aldis, J.

The part payment required by the statute of frauds, in order to make the contract for the sale of goods of the value of over \$40 binding on the parties, does not require the actual passing of money from the vendee to the vendor. But it must be of value—

money's worth—and it must be agreed by both parties at the time that the value is then actually passed from the vendee to the vendor—that it is a then present payment. It is not enough for the parties to agree that it shall be applied as payment. That would be merely an agreement to pay. It must not rest in agreement,—it must be pay down. The payment must be actually made and both parties must so understand it;—the vendee that he pays and the vendor that he receives the value, and thus that the title to the value has passed from the vendee to the vendor.

The statute only requires actual part payment. It does not require that such payment shall be shown by writing—by an indorsement, a credit or a receipt, or by the manual delivery of any article or property of value. It leaves the parties to prove payment by such proof as they may have;—but it does require proof of payment, and not of a mere agreement to pay or to apply in payment.

II.

WARRANTIES.

The contract of sale often involves a subsidiary contract called a warranty, i. e., a guaranty that the goods shall conform to a certain standard or that certain conditions shall be fulfilled. This warranty may be either express or implied. Express warranties of almost any sort may be made. If they are not carried out, the other party may refuse to proceed with the contract, or in the alternative may sue for breach of warranty. No form of words is necessary to create a warranty. It is usually not necessary even that the vendor shall intend to warrant. The question is not whether the vendor intended his statement as a warranty, but whether his intention was that the buyer should purchase the goods in reliance upon the statement. A warranty must in any event be more than a mere expression of opinion, and does not ordinarily cover known defects, since, being discoverable by inspection, they fall within the doctrine of "*caveat emptor*," i. e., "let the buyer beware." A seller is assumed to puff his goods. The seller may by express statement, however, protect the buyer even against such patent defects, as the buyer may prefer to rely upon the warranty rather than on his own judgment. Such a warranty must in all cases be clearly made.

In addition to express warranties, there are, in the absence of a stipulation to the contrary, the following implied general warranties:

1. That the seller has the right to sell the goods, or in the case of a contract to sell, that he will have the right to sell the goods at the time when the title is to pass;

2. That the buyer shall have quiet possession of the goods against the lawful claims of others;
3. That the goods shall be free from any incumbrance in favor of a third person at the time of the sale.

Other implied warranties are determined by the nature of the particular sale:

1. In a sale by inspection (when the buyer himself examines the goods or has the opportunity to examine them before purchase), there are no further implied warranties unless the seller is also the manufacturer, in which event there is a warranty against latent defects not apparent upon reasonable inspection.
2. In a sale by description (when the goods are delivered by the seller to the buyer upon an order without inspection), there are in addition to the general warranties those of merchantability, which corresponds roughly to the idea of salability, and that the goods shall conform to the description.
3. In a sale by sample, there are the following implied warranties:
 - (a) That the goods shall correspond to the sample in quality;
 - (b) That the buyer shall have the opportunity to compare the goods with the sample unless they are sent C. O. D.;
 - (c) That the goods shall be merchantable and free from defects not apparent on reasonable examination of the sample.
4. There is no warranty that the goods are of a particular quality or fitness for any special purpose unless the buyer makes known this particular purpose and relies upon the seller's skill and judgment; unless the goods are bought by description; or unless such warranty has been annexed by usage of the trade.

1. Express and Implied Warranties.

Ingraham v. Union Railroad Company. 19 R. I. 356.

Ingraham bought a horse at an auction at which the defendant put up a number of horses for sale, with the public statement that all horses which were then being sold had been driven single and were safe to drive single. The horse was unsafe and dangerous. Ingraham now sues for breach of warranty in this respect.

Held, that any positive representation may be an express warranty.

Tillinghast, J.

Any positive affirmation or representation made by a vendor at the time of the sale with respect to the subject thereof, which operates as an inducement thereto, unless it be the expression of a mere matter of opinion, or purely matter of description, constitutes a warranty. In other words, a warranty under a sale of personal property is a statement or representation of fact made by the vendor as to the character or quality of the article sold or of the title thereto, whereby the vendor promises that the thing is or shall be as represented. "A warranty is a statement of fact as to an article sold, coupled with an agreement to make the statement good." Such an agreement may be expressed or implied. Nor is any particular form of words necessary to create a warranty; any definite statement or affirmation as to the quality of the thing sold, made by the seller at the time, which it may reasonably be supposed was intended to induce the sale, and which is relied on by the purchaser, may be regarded as constituting a warranty; and if the vendor at the time of the sale affirms a fact as to the quality of the thing sold, in clear and intelligible language, and the purchaser buys on the faith of such affirmation, there is an express warranty, and the vendor is liable in damages if the article sold is not what it is represented to be. Nor is it true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. For if the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not. "He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce in the mind of the vendee."

[The language used by the defendant's agent] was equivalent to an affirmation that all horses which should be then and there sold were kind and safe to drive singly unless the contrary was stated. If, therefore, the plaintiff purchased the horse in question relying upon said affirmation, and it turned out that said horse was unsafe and dangerous to drive singly, and the plaintiff was damaged thereby, we think he is entitled to recover.

2. Dealers' Talk.

Vulcan Metals Co. v. Simmons Mfg. Co. 248 Fed. 853.

The Simmons Manufacturing Company sold the Vulcan Metals Company vacuum cleaners and machinery upon representations

by the president of the Company that the cleaner was clean, economical, efficient, and perfect in the smallest detail; that a child of six could use it; that it worked completely and thoroughly; and that it had never been placed on the market. The cleaner was in fact of little value, and the Vulcan Metals Company discontinued its manufacture almost immediately. It sues for damages arising from these representations.

Held, that statements of value and general excellence are merely dealers' talk, and not actionable; but that statements of actual experiences with the subject matter do not fall within the rule.

Hand, Dis. J.

The general commendations touching the quality and powers of the patented machine raise the question of law how far general "puffing" or "dealers' talk" can be the basis of an action for deceit.

The conceded exception in such cases has generally rested upon the distinction between "opinion" and "fact;" but that distinction has not escaped the criticism it deserves. An opinion is a fact, and it may be a very relevant fact; the expression of an opinion is the assertion of a belief, and any rule which condones the expression of a consciously false opinion condones a consciously false statement of fact. When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, it is no excuse to give a false one. And so it makes much difference whether the parties stand "on an equality." For example, we should treat very differently the expressed opinion of a chemist to a layman about the properties of a composition from the same opinion between chemist and chemist, when the buyer had full opportunity to examine. The reason of the rule lies, we think, in this: There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth. It is quite true that they induce a compliant temper in the buyer, but it is by a much more subtle process than through the acceptance of his claims for his wares.

So far as concerns statements of value, the rule is pretty well fixed against the buyer. It has been applied more generally to statements of quality and serviceability.

In the case at bar, since the buyer was allowed full opportunity to examine the cleaner and to test it out, we put the parties upon an equality. It seems to us that general statements as to what the cleaner would do, even though consciously false, were not of a kind to be taken literally by the buyer. As between manufacturer

and customer, it may not be so; but this was the case of taking over a business, after ample chance to investigate. Such a buyer, who the seller rightly expects will undertake an independent and adequate inquiry into the actual merits of what he gets, has no right to treat as material in his determination statements like these. The standard of honesty permitted by the rule may not be the best; but the chance that the higgling preparatory to a bargain may be afterwards translated into assurances of quality may perhaps be a set-off to the actual wrong allowed by the rule as it stands. We therefore think that the District Court was right in disregarding all these misrepresentations.

As respects the representation that the cleaners had never been put upon the market or offered for sale, the rule does not apply; nor can we agree that such representations could not have been material to Freeman's decision to accept the contract. The actual test of experience in their sale might well be of critical consequence in his decision to buy the business, and the jury would certainly have the right to accept his statement that his reliance upon these representations was determinative of his final decision. We believe that the facts as disclosed by the depositions of the Western witnesses were sufficient to carry to the jury the question whether those statements were false. It is quite true, as the District Judge said, that the number of sales was small, perhaps not 60 in all; but they were scattered in various parts of the Mountain and Pacific States, and the jury might conclude that they were enough to contradict the detailed statements of Simmons that the machines had been kept off the market altogether.

3. Implied Warranty of Title.

Gould v. Bourgeois. 51 N. J. L. 361.

Gould and Downs had a contract with Holly Beach City to build a breakwater, which contract they assigned to Bourgeois, taking as part consideration Bourgeois' note on which they now sue. It later turned out that the city did not have the power under its charter to build the breakwater. Bourgeois contends that Gould and Downs warranted a valid contract when making the assignment.

Held, that a vendor does not warrant his title if the circumstances indicate that there was no such intent.

Depue, J.

The theory on which a warranty of title is implied upon the sale of personal property is, that the act of selling is an affirmation of title. The earlier English cases adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person, annexing a warranty

of title to the former, and excluding it in the latter. In the celebrated case of *Paisley v. Freeman*, 3 T. R. 51, Buller, J. repudiated this distinction. "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion, and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." Nevertheless, the English courts continue to recognize the distinction at least so far as to annex the incident of an implied warranty of title on a sale by a vendor in possession. Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. The rule in force in England at this time [is]: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." In this country the distinction between sales where the vendor is in possession, and where he is out of possession, with respect to implied warranty of title, has been generally recognized, but the tendency of later decisions is against the recognition of such a distinction and favorable to the modern English rule. There seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it.

But there is a line of English cases holding that where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied. In this proposition, the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction. Thus, on a sale by a pawnbroker at public auction, of goods pledged to him in the way of business, there [is] no implied warranty of absolute title, the undertaking of the vendor being only that the subject of the sale was a pledge, and irredeemable by the pledgor.

Stating the principle in the negative form, that there is no undertaking by the vendor for title unless there be an express warranty of title, or an equivalent to it by declaration or conduct, affects only the order of proof. It was conceded that the pawnbroker selling his goods undertook that they had been pledged and were irredeemable by the pledgor.

In the case in hand, the circumstances connected with the assignment, independent of the words "all our right, title and interest," &c., contained in it, preclude the implication of a warranty of the validity of the contract. Taken in connection with the words of the assignment, the intention of the parties is free from doubt.

4. Implied Warranties of Quiet Enjoyment and Against Incumbrances.

Hodges v. Wilkinson. 111 N. C. 56.

Hodges exchanged a mule with Wilkinson for a horse. It appeared that the horse was mortgaged to Wahab, who seized it while in the possession of Hodges, who brings this suit for breach of the warranty of quiet enjoyment and the warranty against incumbrances which he claims to be implied in the transfer.

Held, that in a contract of sale there is a warranty of quiet enjoyment and of freedom from incumbrances.

Avery, J.

The warranty of a title implied in every sale of a chattel has been declared by this court to be in effect a covenant for quiet enjoyment. The distinction between the breaches of express and implied warranties of personal property has not been generally recognized, though at least one court and text-writers of the highest respectability have given their sanction to it.

If the question had been left an open one, however, strong reasons, well supported by authority, might be adduced in favor of the contention that covenants of warranty of the title to chattels, whether expressed or implied, are analogous rather to the personal covenant that the grantor is seized of land, has full right to convey it, and that the land is free from incumbrances, than to the covenants of warranty and quiet enjoyment, which run with the land, and that a breach is created and the right of action accrues at the time of the sale, if the title of the seller is then defective.

But it seems to be settled that it is not an essential prerequisite to recover on the covenant of warranty or quiet enjoyment in a deed for land even that the plaintiff should show that he has been actually evicted under legal process. If he has not been so evicted, yet if he show that he has yielded the possession to the owner by title paramount, or that the lands being unoccupied, such true owner has entered and acquired possession, it is sufficient evidence of a breach of the warranty. Proof of "the existence of a better title with an actual possession in another under it," is equivalent to evidence of an eviction and the plaintiff will be relieved of the burden of showing a breach of the covenant which he takes upon himself in bringing the action when he adduces such proof of title as makes further contention probably useless. The law does not require one to do a vain thing. It is not incumbent on him to make himself a trespasser by an actual entry, nor to incur the useless expense and suffer the needless delay incident to bringing a hopeless suit. The covenant of warranty is "subject to the same construction with a covenant for quiet enjoyment." Actions on the warranty of title implied in the sale of personal property being then governed by

the same rules as to the burden of proving the breach as those brought upon covenants for quiet enjoyment of lands, it necessarily follows that it was sufficient for the plaintiff to show that Wahab had title to the horse in controversy by virtue of the mortgage when Wilkinson sold to the former, and that the horse had been seized and the possession of him acquired by Wahab by virtue of the warranty in the claim and delivery proceeding brought against the plaintiff.

5. Sale by Inspection: Caveat Emptor.

Northern Supply Co. v. Wangard. 117 Wis. 624.

The Supply Company sold a carload of potatoes to Wangard, a groceryman, who refused to pay on the ground that they were not sound when received, and that he had so notified the Supply Company upon examining them a few days after their arrival. The Supply Company contends that by receiving the goods, Wangard lost his right to object later to their quality.

Held, that in a sale by inspection, the buyer has a reasonable time in which to make inspection.

Marshall, J.

It is conceded that the contract in question here was executory in character. The title to the potatoes did not pass from seller to buyer till the transit thereof ended at Tomahawk and the property was accepted by the purchaser, actually or constructively, in satisfaction of the contract. As to such a contract the rule as first formulated by this court was as follows: "When the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination, and knows of such defects, he must, either when he receives the goods or within what under the circumstances is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise the defects will be deemed waived."

That has been changed somewhat by removing the feature contained in the literal sense at least of the quoted language, that there must not only be acceptance with full means of knowledge but with actual knowledge of the defects in order to waive the warranty in respect thereto, an idea which was probably not intended to be embodied in the rule. Now it is understood that the maxim *caveat emptor* will apply as to patent defects if the purchaser has full means of knowledge thereof by the exercise of ordinary attention to his business, which requires him to at least look at what he buys as it comes into his possession, or when it is offered to him, or within a reasonable time thereafter, so as to observe patent imperfections if there are such. In the original statement of the rule the idea of the result of acceptance with knowledge and with means of knowledge

should have been used in the disjunctive instead of the conjunctive. That is, a person is chargeable with knowledge of all that under the circumstances of the case he ought to know, and he is also chargeable with such knowledge as he in fact possesses, whether such possession is the result of the exercise of mere ordinary care or not.

"If a person sells another property to be delivered, accompanying the sale with a warranty, and when delivery takes place there are defects in the property which are discoverable by a person of ordinary intelligence in the circumstances of the purchaser, by the exercise of ordinary care, and such other nevertheless accepts the property, neither objecting thereto then nor within a reasonable time thereafter, he thereby waives the defects so that he can neither rescind the same, counterclaim for damages when sued for the purchase price, nor sue for damages for breach of warranty after paying for the property."

It would be well to read into that rule after the word "thereafter,"—"nor notifying such person that the property will not be considered as in satisfaction of the contract."

From what has been said it will be easily seen that when the trial court, in the quoted instructions, gave the jury to understand that it was permissible for them to find that appellant waived the warranty by taking the potatoes from the car, even as to defects discoverable only by examining the internal condition thereof, he went altogether too far. The mere act of taking the potatoes from the car did not waive anything, necessarily. It was proper for appellant to receive the potatoes into his possession and to take what under the circumstances was a reasonable time to observe their condition, even as to matters evidenced by the external appearance thereof, and to notify the respondent that the property, or a portion of it, was not accepted as satisfying the conditions of the purchase, without prejudice to his right to insist upon the warranty. The evidence is undisputed that within a very few days after the potatoes were taken from the car, and in the letter notifying the respondent of a return of the sacks in which they were shipped, the latter was advised that appellant would look to it to stand the loss from the potatoes not being such as he bargained for. That, obviously, was a sufficient notification to respondent that the potatoes, though received, were not accepted as satisfying the purchase contract.

6. Sale by Inspection: Warranty When Seller is Manufacturer.

Kellogg Bridge Co. v. Hamilton, 110 U. S. 108.

The Kellogg Bridge Company was engaged in building a bridge for the Lake Shore and Michigan Southern Railroad Company. When the bridge was partially built, the Bridge Company contracted with Hamilton that he should begin where it left off, and finish the work. He did so, but some of the structures erected by

the Bridge Company sank under the weight of the bridge, and had to be replaced by Hamilton. He contends, in a suit for the amount due, that there was a warranty by the Bridge Company that these structures were suitable.

Held, that when the seller is the manufacturer, there is a warranty against latent defects.

Harlan, J.

The argument in behalf of plaintiff in error proceeds upon the ground that there was a simple transfer by the company of its ownership of the work and materials as they existed at the time of the contract; that Hamilton took the false work for what it was and just as it stood; consequently, that the rule of *caveat emptor* applies with full force. The position of counsel for Hamilton is that, as in cases of sales of articles by those manufacturing or making them, there was an implied warranty by the Bridge Company that the work sold or transferred to Hamilton was reasonably fit for the purposes for which it was purchased.

"No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies."

The authorities indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation,

inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.

Although the plaintiff in error is not a manufacturer in the common acceptation of that word, it made or constructed the false work which it sold to Hamilton. The transaction, if not technically a sale, created between the parties the relation of vendor and vendee. The business of the company was the construction of bridges. By its occupation, apart from its contract with the railroad company, it held itself out as reasonably competent to do work of that character.

7. Sale by Description: Warranty of Conformity to Description.

Nichol v. Godts. 10 Ex. Rep. (Eng.) 191.

Nichol & Company sold Godts "foreign refined rape oil, warranted only equal to samples." Some of the oil was delivered, and Godts refused to take the rest, on the ground that the oil, though it corresponded to the sample, consisted of rape oil adulterated with hemp oil. Nichol & Company sue Godts for failure to take the remainder.

Held, that in a sale by description, the goods must conform to that description.

Pollock, C. B.

The jury [were instructed] that, according to the true construction of this contract, not only the article delivered must agree with the samples in quality, which was the meaning of the words "warranted only equal to samples," but also that the oil ought to agree with the description of it in the contract as to its character. It was contended that the expression "warranted only equal to samples" excluded every other description of warranty; and, provided the oil delivered was equal to the samples, that was sufficient to render the defendant liable to take it and pay for it, although, in point of fact, it did not answer the description of being foreign refined rape oil. The effect of that argument is, to render the words "foreign refined rape oil" of no avail. Such a proposition cannot be supported. I think the direction was perfectly correct; for it could not be contended that, if it had turned out that the oil was whale oil, the contract would have been performed.

Platt, B.

By the terms "only equal to samples" I understand that the oil to be delivered was to be equal to the samples in quality. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And if that was so, the defendant was not bound to accept it. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but that question was put to the jury, and they were of opinion that it was not known as such. Then how could it be said that what the plaintiff tendered was what he agreed to sell.

8. Sale by Description: Warranty of Merchantability.

Inter-State Grocer Co. v. Bentley Co. 214 Mass. 227.

The plaintiff, the Inter-State Company, ordered sardines from the Bentley Company, and paid for the goods without inspecting them. The sardines were unsalable and the plaintiff seeks to recover the money so paid.

Held, that in a sale by description, there is an implied warranty of merchantability.

Rugg, C. J.

Upon the sale of goods by name or description, in the absence of some other controlling stipulation in the contract, a condition is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to have value. This is not a warranty of quality. It does not require any particular grade. It is a requirement of identity between the thing which is described as the subject of the trade and the thing proffered in performance of it. The buyer is entitled to receive goods fairly answerable to the description contained in his contract of sale. It does not matter whether the deleterious characteristic is latent or obvious, provided it goes to the extent of changing the nature of the goods, so that they have no value in the market under the designation contained in the contract of sale. This is a general rule applicable alike to all, whether they be manufacturers or dealers or merely sellers. It was declared early in this Commonwealth, and has been adhered to consistently.

This being the governing principle, it is of no consequence whether the seller is a manufacturer or not, or whether the defect is hidden or discoverable by inspection. Upon a sale even by a casual owner of sardines, he is bound to deliver something which

answers that description in the trade. If he does not, he does not perform his contract.

This rule is quite apart from instances where the sale is of specifically defined goods, whether open to the inspection of the parties or not, where the rule of *caveat emptor* governs. It is distinct also from a sale expressly or avowedly to the knowledge of both parties for a particular purpose, as to which another rule prevails. All these rules are different statements of the principle that the buyer has a right to get that which he has bought. They deal not with a warranty of quality but with a condition of the contract. They touch the identity of the subject with that tendered in performance of it. This principle also is quite separate from that frequently applied in purchases from manufacturers and sometimes from dealers, where the buyer relies upon the skill or knowledge of the seller, and there arises some sort of implied warranty of quality. If the goods in the case at bar were not salable for some price as sardines when they were delivered to the plaintiff, there was a breach of contract by the seller.

9. Sale by Sample: What is Sale by Sample.

Jacobs v. Day. 25 N. Y. S. 763.

Day's firm sold Jacobs' assignor raisins by sample. The goods did not conform to the sample and the plaintiff sues for damages.

Held, that what constitutes a sale by sample is a question of fact.

Bischoff, J.

The circumstance, merely, that at the time of the sale a sample was produced, is not sufficient to constitute the sale one "by sample." To have that effect it must be fairly inferable from the evidence that the parties mutually understood, or that at least that the seller intended the buyer to understand that the bulk of the commodity sold should in kind and quality be equal to the sample shown. That a portion of the bulk of the goods sold was examined by the buyer at the time of the sale is not conclusive that the sale was not "by sample." Neither is a sale conclusively one "by sample" because, at the time of the sale, a sample was produced, and it was inconvenient or impracticable to examine the bulk of the goods sold. These circumstances, however, should be duly considered in arriving at a conclusion that the sale was or was not one "by sample." The question, therefore, is in every case one of the intention of the parties, to be determined from the evidence.

The production of a sample, the assurance of one of the defendants that the bulk of the raisins corresponded to it, the demand by plaintiff's assignor to be permitted to examine the bulk, and that such

examination would have entailed the necessity of opening upwards of 100 boxes, are facts which, taken in connection with the further fact that defendants' salesmen refused to accord plaintiff's assignor an opportunity to examine more than one box, reasonably lead to the inference that it was intended, at the time of the sale, the plaintiff's assignor should rely on the sample shown, and her testimony indicates that by force of circumstances she did so. The sale to her must therefore be deemed to have been one "by sample." Such a sale is upon an implied condition precedent that the bulk of the goods sold corresponds to the sample. The buyer is entitled, after delivery, to a reasonable time within which to examine the bulk before acceptance will be presumed, and upon breach of the condition he may rescind the sale, and offer to return the goods.

It was not necessary for plaintiff to show that the contents of every box delivered did not correspond to the sample. It was sufficient that a substantial quantity of the raisins delivered was deficient in that respect to justify the rejection by plaintiff's assignor of all, since she could not be compelled to accept part delivery in performance of the contract of sale on defendants' part.

10. Sale by Sample: Warranty of Correspondence to Sample.

Spring v. Slayden-Kirksey Woolen Mills. 106 Ill. App. 579.

A traveling salesman for the Woolen Mills showed samples of trousers to Spring, who ordered a number of dozen in dozen lots according to the different samples. When the goods were delivered, only one dozen conformed to the quality of the samples. Spring returned the remainder. The Woolen Mills bring suit for the price.

Held, that in a sale by sample, the goods must correspond to the sample in kind, character and quality.

Worthington, J.

The uncontradicted testimony of Evans shows this to be a divisible, and not an entire, contract. If all the pants purchased had been of one lot, a different case would be presented. In such instance the case would be similar to [one] where six cases of beavers were bought, by sample. The court held this to be an entire contract, and that, to rescind, all the cases must be returned. If the evidence had shown that the cases were of different lots or qualities, and of different prices, the facts would have been on all fours with the facts in this case, and the decision would be pertinent.

In [another case] the contract was for eighty-one gallons of Affenthaler red wine. This was held to be an entire contract. There was not, as in the present case, different lots of wine, of different qualities and prices. Where goods are sold by sample, it

is a condition precedent that the goods, when delivered, shall correspond with the sample by which the sale is made, in kind, character, and quality.

"Where a sale of goods is effected by exhibiting a sample, or where the purchaser has no opportunity of inspection, in the first instance, the bulk must be as good as the sample, and in the latter, it must be as represented."

A sale by sample is equivalent to a warranty that the sample is a true representative of the goods.

It is well settled that, where articles purchased under a contract of warranty are not of the kind or quality warranted, the purchaser may rescind the contract.

When different articles are bought at the same time, for different prices, though of the same general description, the contract is not entire, but is a separate contract for each article sold, unless the taking of the whole was rendered essential, either by the nature of the subject matter or by the act of the parties.

II. Sale by Sample: Warranty of Right of Inspection.

Lorymer v. Smith. 1 B. & C. (Eng.) 1.

Smith bought wheat of Lorymer according to samples shown. Lorymer then refused to allow Smith to inspect the wheat, and Smith elected to treat this refusal as a termination of the contract. Lorymer sues for his refusal to take delivery.

Held, that in a sale by sample, the buyer has a right to inspect the goods.

Abbott, C. J.

It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk; which is so reasonable that, without any such usage, the law would give him that right. Here, on the 19th of September, the buyer desired to see the whole of the wheat in bulk, but the seller refused to show it; upon that refusal, the request having been made at a proper and convenient time, the buyer was entitled to rescind the contract.

Holroyd, J.

The buyer had a right to inspect the wheat in bulk, in order to ascertain whether it corresponded with the sample, and might have insisted upon having it delivered immediately upon tendering a banker's bill for the price. The seller not being ready to complete his part of the contract of the 19th of September, when he was requested to show the wheat, cannot afterwards insist upon performance by the buyer.

12. Sale by Sample: Warranty Against Defects not Apparent.

Drummond & Sons v. Van Ingen & Co. 12 A. C. (Eng.) 284.

Van Ingen & Company ordered worsted cloth by sample, to be of the "quality" of the sample, from Drummond & Sons, manufacturers, for the purpose of resale, as the manufacturers knew. It later appeared that, owing to a defect in the manufacture not easily apparent on examination, the cloth, which corresponded in every particular with the sample, did not possess wearing qualities, and was therefore useless for the purpose of resale. In a suit for the price brought by Drummond & Sons, the defendant sets up this latent defect by way of counter claim.

Held, that in a sale by sample, there is an implied warranty against defects not apparent from a reasonable examination of the sample.

Earl of Selborne, L. C.

It remains to be considered, whether this was a defect of quality against which there was an implied warranty by the appellants, under all the circumstances of the case. That it was a defect of quality seems to me indisputable; and, if it was known to the respondents when they gave the order, or if (as between themselves and the appellants) they ought to be taken as having discovered, or as having had means which they ought to have used of discovering it from the samples, I should hold that it was covered by the word "quality" as used in the contracts, and that there was no implied warranty against it. But if it was a latent defect, of which knowledge, or means of knowledge which ought to have been used, could not properly, under the circumstances, be imputed to the respondents, then I think that the word "quality," as used in the contracts, ought to be restricted to those qualities which were patent, or discoverable from such examination and inspection of the samples as, under the circumstances, the respondents might reasonably be expected to make; and that it cannot be extended to defects in the texture of the samples, rendering the cloth so manufactured unmerchantable for the purposes for which the order was given, of which such examination and inspection would give the merchants, practically, no notice.

I do not think it necessary to go into any of the cases which have been decided upon questions of this kind; I think it sufficient to say that, while the doctrine of implied warranty ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them, yet I think it does extend to such a case as the present, if the goods, being of a class known and understood between

merchant and manufacturer as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended. If it would be unreasonable, on the one hand, to expect from the manufacturer a more exact knowledge than in the ordinary course of business would be likely to reach him of the processes and modes of treatment through which manufactured goods may pass, in the hands of the merchant or his customers, before being adapted to their ultimate uses, it would be not less unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business, and will use such methods as may be proper to produce a good article of the kind ordered. The burden of ascertaining beforehand that this can be done, or how it is to be done, does not rest upon him.

13. Warranty of Fitness for Particular Purpose.

Jones v. Padgett. L. R. 24 Q. B. D. (Eng.) 650.

Jones carried on the business of woolen merchant at one address and of tailor at another. He ordered "indigo blue cloth" to be made according to sample by the defendants, who were woolen manufacturers, intending, although this was not known to the defendants, to use the cloth in his business as a tailor for the making of liveries. The cloth was unsuitable for this purpose, though that could not be determined from a reasonable examination of the sample. Jones sues for breach of an implied warranty that the cloth should be fit for the making of liveries.

Held, that there is no implied warranty of fitness for any particular purpose unless the buyer makes known his needs to the seller.

Lord Colridge, C. J.

There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here, all that was shown was that the seller on the one side was a manufacturer, and the buyer on the other side was a woolen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for which they were not

fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them. But there was nothing beyond the position of the parties to show that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. If the plaintiff is to succeed, it must be on the ground of the reasonableness of imputing such knowledge to the manufacturer. I do not see that there was any evidence that the making of liveries was the only purpose, or even the most usual purpose, for which this particular kind of cloth was ordinarily used, and unless that is so there is nothing to fix the manufacturer with knowledge which would bring the case within the rule.

14. Warranty of Fitness: Reason for the Rule.

Randall v. Newson. L. R. 2 Q. B. D. (Eng.) 102.

Randall bought of Newson a carriage to which a new pole was fitted at Randall's special order. The pole broke and injured Randall's horses. Randall sues on an implied warranty that the pole was fit for a carriage pole.

Held, that when goods are bought for a special purpose, known to the vendor, there is an implied warranty that they are fit for that purpose.

Brett, J. A.

In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject matter of the bargain of purchase or sale, or, in other words, the contract. If that subject matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description; that is to say, shall be that article or commodity, salable or merchantable. If the subject matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description; that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale

must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out.

15. Warranties Annexed by Usage.

Barnard v. Kellogg. 10 Wall. (U. S.) 383.

Barnard placed a lot of wool in the hands of brokers to sell, with instructions not to sell unless the purchaser examined the wool. Kellogg, having seen several samples of the wool, stated that his firm would take the wool if it conformed to sample. The brokers refused to sell by sample and Kellogg examined the wool as fully as he desired. After delivery it was found that much of this wool was fraudulently packed, though without the knowledge of Barnard. Kellogg & Company sue to recover damages on an implied warranty against fraudulent packing, which they contend exists by custom among wool brokers.

Held, that custom will not create a warranty inconsistent with the terms of the contract.

Davis, J.

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. Usage "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of

the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

III.

TRANSFER OF PROPERTY BETWEEN BUYER AND SELLER.

Property in goods cannot pass until the goods are ascertained. Consequently it becomes of importance to determine what are ascertained goods. The question is one of fact rather than of law, and must depend upon the particular circumstances of the case. Whatever establishes the exact identity of the goods suffices to make them ascertained.

When there is a contract to sell such goods, title to them is transferred at such time as the parties to the contract intend that it shall be transferred. For the purpose of determining the intention of the parties, regard should be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. The Sales Act contains rules (quoted D. 1. *infra*) to assist in ascertaining the intention of the parties.

There may be a contract to sell, or a sale of, an undivided share of goods. If the parties intend to effect a present sale, the buyer, because of the agreement, becomes an owner in common with the owners of the other shares. There is a conflict between the laws of different states in event of the sale of a part of goods in a mass of such goods. In some jurisdictions, selection from the mass must be made before title can pass. Other jurisdictions hold that a sale of a quantity fixed by weight, measure, or count, is made when the intention so to do is manifest. In all jurisdictions delivery of the entire mass to the buyer with the power to make his own selection is evidence of the intention to pass the property. Under the statute, in the case of fungible goods, i. e., goods any unit of which is treated as the equivalent of any other unit because of its nature or mercantile usage, there may be a sale of an undivided share of a specific mass, or of a definite number, weight, or measure of the goods in the mass. By such a sale the buyer becomes an owner in common with other owners, and if the entire mass is not as much as the quantity sold to him, he takes title to the entire mass.

In the absence of an agreement to the contrary, goods remain at the seller's risk until the property is transferred to the buyer,

but thereafter they are at the buyer's risk whether delivery has been made or not. This rule is subject to the following exceptions:

1. When delivery has been made and title retained by the seller merely to secure payment, goods are at the buyer's risk from the time of delivery.
2. When delivery has been delayed through the fault of the buyer or seller, the goods are at the risk of the party in fault to the extent of any loss occasioned by such fault.

As a rule, no person can sell personal property so as to convey a valid title unless he is the owner thereof. The buyer secures no better title to goods than the seller had, unless the owner of the goods is, by his conduct, precluded from denying the seller's authority to sell. When the seller has a voidable title to goods but his title has not been avoided at the time of the sale, the buyer acquires a good title if he buys in good faith, for value, and without notice of the seller's defect of title. Under the Sales Act, when a person has sold goods and continues in possession of them or of a negotiable document of title to them, and delivers the goods, or transfers such a document, to any person for value, the transfer has the same effect as if it were authorized. The true owner of the goods really makes the person in possession his agent by allowing him to continue in possession; hence, any transfer made by him is under an ostensible authority to do so. This idea goes farther than the common law, which required an element of estoppel in addition to mere retention of possession. When a seller retains goods in order to defraud his creditors or for any other fraudulent purpose, any creditor of the seller may treat the sale as void.

Any person to whom a negotiable document of title is negotiated, acquires the title of the person negotiating the document, and the rights of a purchaser in good faith from the person to whom the instrument was originally made out. In the case of a non-negotiable document of title, the person who receives the document secures only such title as his assignor had, and rights of third persons against this assignor may be enforced against him.

A. When Title Passes.

1. Intent the Determining Factor.

Lingham v. Eggleston. 27 Mich. 324.

Eggleston owned lumber in a mill-yard, the amount of which was not exactly determined. Upon payment of \$500 on account,

he sold all the lumber to Lingham and Osborne at a certain price per thousand, leaving the exact amount to be determined later. The lumber was destroyed by fire and Eggleston sues to recover the balance.

Held, that title to property passes when the parties intend it shall pass; but if something remains to be done by the vendor before delivery, intent that title pass immediately is not usually to be inferred.

Cooley, J.

Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory must usually be determined upon the intent of the parties, to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract, but if they fail to do so, we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive.

The question is "a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, not before. In this, as in other cases, the parties are apt to express their intentions obscurely; very often because the circumstances rendering the point of importance are not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction which, in their nature, are more or less technical. Some of them seem very well fitted to aid the court in discovering the intention of the parties; the substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which their contract is to attach are agreed upon. Where the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable shape, or when anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those

things a condition precedent to the transfer of the property. But as these are only rules for the construction of the agreement, they must yield to anything in the agreement which clearly shows a contrary intention. The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please." In *Benjamin on Sales*, the same doctrine is laid down, and it is said that "nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel."

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting and many things [remained] to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is [one] where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The court held that the question was one of intention merely, and that it was evident the parties intended the title to pass.

But where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing or measuring them, when the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.

[Here] something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title—nothing to the contrary appearing—the court should have so instructed the jury.

2. To What Goods Title May Pass.

Low v. Pew. 108 Mass. 347.

John Low & Sons sold to Alfred Low & Co. by bill of sale on which \$1,500 was paid at the time, all the halibut that might be caught by their fishing schooner then on a trip to the Grand Banks. Subsequently, John Low & Sons went into bankruptcy and their assignees, the defendants, refuse to deliver the halibut. Suit is brought to establish the right of the plaintiffs to the halibut.

Held, that a present sale of property not yet in existence cannot be made.

Morton, J.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. The same principle is applicable to all sales of personal property.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility of expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest.

The same principles have been applied by this court to the assignment of future wages or earnings. An assignment of future wages, there being no contract of service, [is] invalid. If a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

3. To What Goods Title May Pass: Mortgage of Stock in Trade.

Sawyer v. Long. 86 Me. 541.

Morrison made a mortgage to Sawyer of his stock and fixtures. The agreement provided that he might sell the stock provided he replaced it with other stock of like kind, which should be subject to the mortgage. Morrison later became insolvent, and Sawyer sues a purchaser from Morrison's assignee to recover the goods mortgaged, though he has not taken possession of them.

Held, that a mortgage of existing goods is valid and may extend to other goods substituted for them.*

Haskell, J.

As to the stock. A chattel mortgage does not pass the legal title of after-acquired property to the mortgagee, without some new act sufficient to accomplish the purpose, like a delivery to and retention of the same by the mortgagee, or a confirmatory writing properly recorded, and the like. The reason is that, as the after-acquired property is not in existence to be conveyed by the mortgage, title to it cannot be transferred in advance, for "a man cannot grant or charge that which he hath not." Things that have a potential existence are an exception to the rule. Equity, however, creates "a lien upon the *res* when produced or acquired, leaving the legal title still in the grantor, who may by some act ratify the grant, as by delivery of the property, and then the legal title is complete in the vendee." And without such confirmatory act equity will sometimes enforce the mortgage, when the balancing of equities shows that it should be done.

If a mortgage of chattels stipulates that the mortgaged property may be put on sale by the mortgagor, who is required to keep the security good by applying the proceeds to the purchase of new articles of like kind to those sold, the chattels so purchased become substituted for those sold at the instance and under authority from the mortgagee, so that the legal title to them may be said to pass to him as effectually as if he had himself made the sale, by assent of the mortgagor, and with his own hand replenished the *res*. The mortgagor by doing so simply executes a power, performs a trust created by the mortgage, and thereby neither depletes the security nor defrauds his other creditors.

The defendant being a bona fide purchaser, and no estoppel arising as to him, the plaintiff may recover so much of the stock replevied as he has shown a title to under the doctrines of this opinion, viz., that in existence at the date of mortgage and that substituted for articles sold by purchase from the proceeds of sales, and no more.

As to the fixtures. Those articles only that were in the store

* Cf. *Low v. Pew*, preceding case, for minority rule.

when the mortgage was made passed by it. The word fixtures, in the sense used by the parties, means chattels of a permanent nature in contradistinction from those kept for sale, such as were incident to the convenient use of the store.

4. Goods Must be Ascertained and Appropriated to the Contract.

Allen v. Elmore. 121 Ia. 241.

Elmore bought at auction hay stored in Allen's barn, which had not been weighed or measured. A part of the purchase price was paid, but before any of the hay was removed, it was destroyed by accidental fire. Allen sues for the price.

Held, that by the majority rule title passes when goods are ascertained and appropriated, even though they still remain to be measured.

McClain, J.

The only objection made by counsel for appellant with reference to his liability is based on the fact that the quantity of hay had not been ascertained at the time of its destruction, and that weighing was still necessary to determine the purchase price to be paid. It is true that, so long as anything remains to be done between the parties to ascertain and identify the particular property which is to pass, the sale is not complete. But if the property has been identified so that the transaction relates to a specific and ascertained chattel, then the question is one of intent, and the fact that something remains to be done by the buyer, such as weighing or measuring, for the purpose of determining the price to be paid, does not prevent the transaction being a completed sale, under which the title passes to the buyer, accompanied with the risk of the loss or destruction of the property without the seller's fault. The rule supposed to have been recognized in some of the earlier English cases, to the effect that there could be no passing of title until the purchase price had been definitely determined by weighing or measuring, when necessary, based, as it was, apparently, on the idea that the action for the purchase price must be for a specific sum, definitely ascertained, has not been generally approved by the courts in this country, and it has been held by the great weight of authority that where the payment of the purchase price is not a condition to the passing of title—that is, where credit for the price is given—the fact that weighing or measuring still remains necessary to determine the price will not indicate an intention that the title shall not pass until such acts are done; it being assumed, of course, for the purpose of applying this rule, that the specific goods are definitely ascertained and agreed upon. And, whatever may have been the earlier views of the English judges, that is now the rule in England.

Even if, as is stated in some cases, the question is one of intent, for the jury, we have in this case the conclusion of the trial court, entitled to the same weight as the verdict of a jury, that such was the intent, and the finding is amply supported by the evidence.

5. Ascertained Goods Sold by Weight, Measure, or Count.

Kimberly v. Patchin. 19 N. Y. 330.

Dickinson had in a warehouse 6,249 bushels of wheat. He sold 6,000 bushels to Shuttleworth and agreed to hold that amount for him as bailee. Afterwards, Dickinson sold the whole amount to the plaintiff's assignor. Patchin claims through Shuttleworth.

Held, that there may be a sale of a certain weight, measure, or quantity of goods which will pass title without separation.

Comstock, J.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to constitute an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally but logically impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this I apprehend is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale the thing sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. When the quantity and the general mass from which it is to be

taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

We are of opinion, therefore, both under authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the six thousand bushels of wheat.

6. Sale of Goods from a Mass.

Hurff v. Hires. 40 N. J. L. 581.

Hurff bought from Heritage 200 bushels of corn of a lot of 400 or 500 bushels in Heritage's crib house. He inspected the corn, approved it, and paid cash for it. It was agreed that it should be left in the crib until it hardened, when it should be removed. Hires, a sheriff, attached it in a suit of a third party against Heritage, after which Heritage delivered 200 bushels to Hurff. The sheriff seeks to recover from Hurff the value of this corn.

Held, that by the New Jersey rule title may pass to a portion of goods if the sale is from a larger bulk, uniform in kind and quality, even if there is no separation.

Depue, J.

The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties, to a greater extent than is found in the older cases, and to ingraft upon the rule that the property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of parties. At one time it was held that, under an agreement to purchase an entire bulk at a specified price, the property did not pass if the whole amount of the purchase money depended upon an ascertainment by weight or measurement subsequently to be made.

That the parties contemplated the corn should be measured before it left the vendor's possession will not, of itself, prevent the property passing. Nor will the fact that the vendor was required to deliver it when the time for delivery arrived, accomplish that result. Where the goods sold have been selected and designated, and the price paid, the property will pass by the contract of sale, though it was one of the terms of the contract that the vendor should transport them to

a place named for delivery. The case, therefore, must stand exclusively on the fact that no separation of the quantity sold had been made from the entire bulk before the execution was levied, and the question is whether there is a rule of law requiring, under the circumstances of this case, a separation of the quantity sold from the larger bulk, before title will pass to the purchaser, so positive in its sanction as to overrule the intention of the parties.

It is undoubtedly the doctrine of the English courts that, "where there is bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, there the right to them does not pass to the vendee until the vendor has made his selection." This doctrine is founded on correct principles, where the gross bulk is variable in kind or quality, and the selection from it of that part which shall be delivered is of benefit to the vendor. It has been applied to a sale of a specified quantity, from a larger bulk of uniform kind and value, where the purchaser had seen the goods in bulk and approved of it.

In my judgment, this principle should not be applied where the bulk, from which the quantity purchased is to be separated, is uniform in kind and quality, and has been approved by the purchaser, and the full contract price has been paid. There is a clear and well settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects. It is recognized in cases of a co-tenancy of personal property, readily divisible by weight or measurement, into portions absolutely alike in quality and value. In such cases, either tenant may take his proper proportion, and it will be regarded as a proper severance, so long as he does not take more than his share; but the rule is otherwise in case of property not severable in this manner; in that event, the partition must be by agreement, or proceedings in equity.

While the English courts adhere to the rule that, as between vendor and purchaser, separation of the quantity sold from a larger bulk, identical in kind and quality, is necessary before the title will pass, [a] slight and unimportant circumstance will take the transaction out of the operation of the rule.

In the American courts the cases on this subject are quite conflicting.

In Virginia, New York, Connecticut and Maine, the courts have held the broad doctrine, without qualification, that on a contract of sale of a certain quantity from a larger bulk, uniform in kind and quality, the property will pass, though there be no separation of the quantity sold, if such be the intention of the parties, and that no rule of law will overrule such intention if it be otherwise clearly expressed.

The doctrine held in these cases, it seems to me, is founded on good sense and correct legal principles. The rule that the property in goods will pass by the contract of sale, if such be the intention of the parties, is of the utmost importance in the transaction of the business of the country, and it ought not to be qualified by exceptions

and restrictions which do not arise from the substantial interests of the parties.

In this case the sale, in all material respects, was complete. The corn had been inspected and approved, and the price agreed on and paid. All these things had been done before the levy of the execution. The property had been left with the vendor for the purchaser's convenience. Nothing was left undone but measuring out the designated quantity from a bulk identical in kind and value, and a delivery to the vendee. That was done after the levy, and before suit brought; and there is no pretence that it was unfairly done.

7. Minority Requirement of Physical Separation.

Scudder v. Worster. 11 Cush. (Mass.) 573.

Worster and Hart contracted to sell to Secomb and Taylor 250 barrels of pork. A bill of sale of the pork was made out and notes were given in payment under an agreement that the pork should remain in Worster and Hart's cellar at the risk of the vendees. Secomb and Taylor sold 100 barrels of the pork to Lang, who received delivery from the defendants. Later Secomb and Taylor sold Scudder the other 150 barrels, giving an order on the defendants, who assented to it. Shortly afterwards, Secomb and Taylor became insolvent. Worster and Hart refused to deliver the pork to Scudder, who now seeks to take it. The pork at all times had been part of a larger quantity of uniform quality and marking in the defendants' cellar.

Held, that according to the Massachusetts rule, a sale of goods in bulk will not operate to transfer property until the goods are separated from other goods of the same sort.

Dewey, J.

Had these 250 barrels of pork been a separate parcel, or had the parties designated them by any visible mark, distinguishing them from the residue of the vendors' stock of pork, the sale would clearly have been an absolute one, and the property would at once have passed to the purchaser. There was nothing required to have been done but this separation from the general mass of like kind, to have placed the sale beyond all question or doubt as to its validity.

What was done in this case would have transferred the property in the pork, if the sale had been of all the pork in the cellar, or of any entire parcel separated from the residue, or if the 250 barrels had some descriptive mark distinguishing them from the other barrels not sold. The difficulty in the case is in maintaining that in the absence of each and all these circumstances distinguishing the articles sold, the particular barrels of pork selected by the officer from the larger mass when he served this process were the property of the plaintiff, or had ever passed to him. In addition, however, to the

numerous cases cited to establish the general principles contended for on the part of the plaintiff, and which would have been decisive, if it had been a sale of all the pork in the cellar, or a particular parcel, or certain barrels having descriptive marks which would enable the vendee to separate his own from the residue, were cited several more immediately bearing upon the present case, and where property not separable has been held to pass to the vendee.

"Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods, answering a particular description, and since the vendor would fulfill his part of the contract by furnishing any parcel of goods answering that description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold."

Examining the facts in the case before us, and applying the principles and the approved elementary doctrine as to what is necessary to constitute a sale of property not separated from the mass of like kind, or designated by any descriptive marks, the court are clearly of opinion that the property in the specified 150 barrels of pork taken by the plaintiff, under his writ of replevin, had never passed from the vendors, and therefore this action cannot be maintained.

It was also urged that the defendants were estopped to deny that the 150 barrels of pork were the property of the plaintiff, having given a bill of sale of the same, and under the circumstances stated in the statement of facts. Had this been an action to recover damages for the value of 150 barrels of pork, this position might be tenable, and the defendants estopped to deny the property of the plaintiff in such 150 barrels. This would be so if an action had been brought against the defendants as bailees of 150 barrels of pork, and for not delivering the same.

But the distinction between the case of an action for damages for not delivering 150 barrels, and that of replevin, commanding the officer to take from the possession of the defendants 150 barrels, and deliver the same to the plaintiff as his property, is an obvious one. To sustain the former, it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels. If bought, they must be specifically set apart, or designated in some way as his, and not intermingled with a larger mass of like kind owned by the vendor.

8. Selection by Buyer from Mass.

Weld v. Cutler. 2 Gray (Mass.) 195.

Gooch, in return for Weld's indorsement of a promissory note, gave Weld a mortgage on part of a pile of coal lying on a wharf belonging to Gooch. Later, Weld went to the pile and declared

that he took possession and gave statutory notice of foreclosure. Upon Gooch becoming insolvent, Weld requested him to sell the coal for him. This he did not do, and Weld seeks to recover the coal from the defendant, the assignee of Gooch.

Held, that when a vendee takes possession of an entire mass for the purpose of selecting his portion out of it, title passes without separation.

Bigelow, J.

The recent case of *Scudder v. Worster*, 11 Cush. 573, settles the rule of law in this commonwealth to be, that when there is a contract for the sale of goods, being part of a larger bulk in the possession of the vendor, no property passes to the vendee, unless the portion comprised in the contract of sale is separated from the mass, or is identified by some mark or designation which distinguishes it from the residue. The case at bar would very clearly come within this rule, if the mortgagor had remained in possession of the coal upon his wharf, up to the time of his application for the benefit of the insolvent laws. But the case finds that the mortgagee, with the assent of the mortgagor, had previously taken possession of the entire lot of coal on the wharf, and had proceeded to sell some part of it in payment of the debt secured by the mortgage. It is not therefore a case where the vendor remained in possession of the entire bulk, a part of which he had sold; but the vendee, in pursuance of the contract of sale, had taken possession of the whole, for the purpose of separating and securing his part. In this respect, the case at bar differs from the numerous class of cases upon which the decision of *Scudder v. Worster* is founded. And it appears to a majority of the court that this is a material distinction. The principle upon which those decisions rest is, that the sale is still inchoate and incomplete between the parties; there being no such separation or designation of the property sold, as to constitute delivery of it by the vendor, and possession of it by the vendee, and thus pass the right of property in the articles sold. It is an unexecuted contract of sale, an essential ingredient being wanting to make it perfect between the parties. But in the case at bar the contract was complete and executed. Nothing further remained to be done by the mortgagor. The mortgagee had received from him delivery of the property included in the mortgage, and, although it made part of a larger mass, it was none the less a delivery to and possession by him of the portion included in the mortgage. The property in the part mortgaged passed, it being left to the mortgagee to select and separate it from the whole, which was placed in his possession and control for that purpose. Under such circumstances, it is very clear that neither the mortgagor, nor those claiming under him, could dispute the right of the plaintiff to hold the entire property, until the object for which its possession was delivered to him should have been accomplished. The right of possession of the entire bulk has become

legally vested in the mortgagee for a lawful purpose; neither the mortgagor nor his assigns had the possession or the right to the immediate possession of it; neither of them, therefore, could maintain trespass or trover against the mortgagee; nor could a creditor of the mortgagor, by attachment on mesne process, or seizure on execution, disturb a possession thus acquired. The power to hold the whole property by the mortgagee was coupled with an interest in him, which neither the mortgagor nor his creditors could defeat. The right of all persons, claiming title under the mortgagor, to the property not included in the mortgage, must be taken to be subordinate to the right, previously acquired by the mortgagee, of holding the whole in his possession, until, by the use of due and reasonable diligence, he had separated and taken out the portion mortgaged to him.

For these reasons, a majority of the court are of opinion that this case does not come within the rule touching sales of property in bulk in the hands of a vendor, where there is no designation or separation of the portion sold, but that it comes within a distinct class. The principle on which it rests is, that the delivery of the entire mass to the vendee under the contract of sale, for the purpose of enabling him to separate and take out the portion sold, makes the sale and delivery complete between the parties; that thereby the property in the articles sold passes out of the vendor and vests in the vendee, who has the right to retain the whole, until he has had sufficient time and opportunity to separate and take out the part belonging to him in pursuance of the contract of sale.

9. Effect of Delivery to Common Carrier.

Wigton v. Bowley. 130 Mass. 252.

Fenno ordered a carload of flour from Wigton's firm, which they shipped to him as consignee. They drew a draft on him, which with the bill of lading they sent to a bank in Boston, with instructions to deliver the bill of lading to Fenno, if the draft was accepted. This Fenno did not do. He, however, executed to Bowley's firm an order on the railroad company to deliver the flour to them, which the railroad company did without requiring the production of the bill of lading. Wigton's firm now attempts to recover the value of the flour from Bowley's firm.

Held, that delivery of goods to a common carrier in the absence of other evidence passes the title to the goods to the consignee.

Colt, J.

The receipt given by the railroad, sometimes called the shipping receipt or bill of lading, was taken in [Fenno's] name. The plaintiffs did not intend to retain their hold on the property, after it was

taken by the carrier, as security for the payment of the price.

In the sale of specific chattels, an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title, if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs. Where there is conflicting evidence as to intention, the question is for the jury. It cannot be disposed of as matter of law, unless the evidence will justify a finding but one way.

In the case at bar, the fact that the shipping receipt was not delivered to Fenno, but was sent with the draft to a bank in Boston, is not conclusive evidence, as against the rights of the consignee, that the plaintiffs intended not to part with the title. It was no part of the contract of sale. It was given in the name of Fenno, and could not be transferred by the plaintiffs so as to change title in the property without his indorsement. What passed between the plaintiffs and the bank in Boston, not communicated to Fenno, cannot affect his rights.

It is not shown that the acceptance or payment of the draft was a condition precedent to a change of title; and the finding of the court below cannot be disturbed.

10. Effect of Delivery to Carrier of Goods Agreed to be Delivered.

McNeal v. Braun. 53 N. J. L. 617.

Braun, a coal dealer in Philadelphia, agreed to sell and deliver coal to McNeal at Burlington. He shipped this coal by a barge to Burlington, where it arrived safe alongside McNeal's wharf. Before it was unloaded, the barge sank. Braun sues for the price, claiming that title passed although he had agreed to deliver the coal to McNeal.

Held, that title to property does not pass until delivery, when the contract requires such delivery.

Depue, J.

It is sometimes stated, as a general rule, that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only

where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale. It will also be found that the rule, uniformly adapted in the line of decisions, is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract and the intention of the parties. "When the party undertaking to consign undertakes to deliver at a particular place, the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor." "There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this is also effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination."

"In every contract of sale, there is, on the part of the vendor, an obligation not only to transfer the property in the thing sold, but also to deliver possession to the buyer. When and how that delivery of possession shall take place, whether in the interval the thing sold shall be at the risk of the buyer or of the seller, so that if it be lost without default on the part of the latter, he shall nevertheless be entitled to demand the price or to retain it if already paid, must depend on the agreement of the parties as expressed or to be gathered from the contract. If, by the terms of the contract, the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was in the meantime to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly."

II. Sales by Auction.

Anderson v. Wisconsin Central Railway Company. 107 Minn. 296.

The railway company advertised a sale of property at public auction. Bids were made until the amount reached \$675. Anderson bid \$680 but the auctioneer refused to accept this bid, insisting that the amount of the raise was too small; and sold to the next highest bidder. Anderson sues for damages.

Held, that in a sale by auction bids may be retracted or the property withdrawn from sale until the fall of the hammer.

Elliott, J.

The custom of selling goods at auction is as old as the law of sale. In Rome, military spoils were disposed of at the foot of the spear—*sub hastio*—by auction, or increase. In later times we find a mode of auction called a “sale by the candle,” or by the “inch of candle,” which consisted of offering the property for sale for such a length of time as would suffice for the burning of an inch of candle. In Holland they inverted the usual process, and put the property up at a price usually greater than its value, and then gradually lowered the price until some one closed the sale by accepting the offer and thus becoming the purchaser. In ancient Babylon the young women were sold at a public auction according to a method which combined the features of the Dutch and ordinary kinds of auctions. The group of prospective wives would ordinarily contain some who, by reason of personal beauty, were thought more desirable than others. The attractive ones were first sold to the highest bidders. When the supply of this quality was exhausted, those less favored by nature were offered and sold to the bidders who would take them with the least dowry, which was payable out of the money received from the sale of the beauties. Herodotus considered this custom very commendable.

The idea that an auction will lie for the breach of an implied undertaking to sell to the highest bidder was advanced in *Warlow v. Harrison*, 1 El. & El. 309, and *dicta* supporting it will be found. These cases assume that an offer to sell property at auction is indistinguishable from the case of an offer to the general public, such as a reward for the return of lost property, where it is held that contract rights are created in favor of one who complies with the conditions of the offer. Langdell seems to be the only text-writer who takes this view of what the law should be.

Sale of Goods Act, 1893, provides that “a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid.” Whatever may have been the law formerly, this statute entitles a bidder to withdraw his bid at any time before the fall of the hammer, and the vendor must be equally free to withdraw his offer to sell, because one party cannot be bound while the other is free.

The earnestness with which the respondent contends that the trial court was right in holding that the contract was complete when the bid was made, conditional on there being no higher bid, has induced us to make a somewhat extended examination of the authorities. The result discloses the fact that there has been running through some of the English cases a recognized, but never applied, principle which would sustain the right of action in such a case as the present. But all the cases in which the doctrine is recognized were decided on other grounds. No substantial support for the doctrine is found in the American cases. It is, in fact, utterly irreconcilable with principles which are universally recognized.

Mutuality is an essential element of a contract. One party thereto cannot be bound, and the other remain free. If the announcement of an auction is an offer to sell to the highest good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted.

On principle and authority the correct rule is that an announcement, that a person will sell his property at public auction to the highest bidder, is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls, and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase or the auctioneer his offer to sell. The owner's offer to sell is made at the time through the auctioneer, and not when he advertises the auction sale. A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase, has an action for damages against the merchant. He merely offers to purchase, and if his offer is refused, he has no remedy, although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close. As the advertisement in this case was a mere statement of intention to offer the property for sale at public auction to the highest bidder, the respondent's bid did not complete either a contract of sale or a contract to make a sale.

12. Effect of Bill of Lading.

Merchants' National Bank of Cincinnati v. Bangs. 102 Mass. 291.

Bangs ordered four carloads of corn from Schwartz & Co. of Cincinnati. Schwartz & Co. sent him three carloads, one of which was short in weight. They drew sight drafts on him for the price of three cars as of full weight, which he paid. They later delivered to the railroad company a car of corn consigned to him, taking a bill of lading naming Bangs as consignee, to which they attached a draft on Bangs which they discounted with the bank. Bangs refused to accept the draft and the bank refused to allow him to take the corn. He, however, did secure the corn by paying the railroad freight charges. The bank sues Bangs for conversion. Bangs defends on the ground that the drafts drawn on him were incorrect, that he was not obliged to accept them, and that he consequently had title to the property.

Held, that a bill of lading taken in the name of the consignee is evidence that the title to the goods has passed to him absolutely.

Colt, J.

In all completed contracts of sale, property in the goods sold passes to the buyer, although he may not have come to his actual possession. An unconditional sale of specific chattels passes the title at once, and the buyer takes the risk of loss, and has the right to immediate possession. When anything remains to be done, in the way of specifically appropriating the goods sold to the contract, the agreement is executory and the property does not pass. When, from the nature of the agreement, the vendor is to make the appropriation, then, as soon as any act is done by him, identifying the property, and it is set apart with the intention unconditionally to apply it in fulfilment of the contract, the title vests, and the sale is complete. Thus the delivery to the buyer or his agent, or to a common carrier, consigned to him, whether a bill of lading is taken or not, if there is nothing in the circumstances to control the effect of the transaction, will be sufficient. If the bill of lading or other written evidence of the delivery to the carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer an absolute title to the vendee. But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in course of transportation to the place of destination, by delivery to the carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt, in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser, and in all cases when he manifests an intention to retain this *jus disponendi*, the property will not pass to the vendee. Practically the difficulty is to ascertain, when the evidence is meagre or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain as a matter of law that the evidence will justify a finding but one way.

13. Effect of Invoice.

Hopkins v. Cowen. 90 Md. 152.

Hopkins bought a quantity of flour from the Winnebago City Mill Company without any stipulation as to the time of payment. The flour was delivered to the railroad, of which the defendants were receivers, and Hopkins was notified that the seller had deposited in the bank a draft for the price attached to the bill of lading. By the bill of lading the flour was consigned to the Mill Company, with a direction to notify the plaintiff, to whom an

invoice was sent direct. Hopkins made no offer to pay the draft until several weeks later, when the bank had been instructed not to accept payment or deliver the bill of lading. Hopkins claims that the title had passed to him and seeks to secure the goods from the railroad.

Held, that an invoice is not ordinarily significant of the intent of the parties relative to passing of title.

Page, J.

The general rule applicable to the passing of title to personal property has been well stated, "where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but when, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." The fundamental principle upon which this rule rests is to carry out the intention of parties who have agreed "with respect to a thing capable of identification, that for an agreed price the title to the thing shall pass from the vendor to the vendee."

When the contract is express, there can be no difficulty; but when the evidence with respect to it is meagre, courts must endeavor "to ascertain the intent of the parties and apply that test as a controlling principle." So also where the agreement is for a sale of the property, and the performance of other things, it must be ascertained whether the performance of any of those things is meant to precede the vesting of the title in the vendee. Accordingly, it is held that where a buyer purchases a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specified quantity by delivering them to a carrier, the law presumes that to be equivalent to delivery to the vendee, and in such case the goods become the property of the vendee, although they are to be paid for on arrival, the carrier being regarded as the agent of the vendee to receive it. But if the vendor undertake to make delivery himself at a distant place, the carrier becomes the agent of the vendor, and the property will not pass until delivery is made. In both such cases, the inference arising from the facts stated may be rebutted by other circumstances which tend to show what the interest of the parties really was.

The whole course of these dealings shows that the Mill Company was to pay the freight and deliver the flour in the city of Baltimore, and that the appellant was not to be entitled to possession until after the draft had been paid. The invoice cannot have the effect of

modifying the contract, which the facts so clearly imply. The purpose and effect of that was to give a description and cost of the goods; it was not "a bill of sale nor evidence of a sale," and even though in some cases it may be useful, in connection with other facts, to show the intent of the parties, yet in this case no inferences can flow from it tending to alter or change the intent inferable from the circumstances already stated, for the reason that, appended to the invoice, as a part of it, was the explicit statement that the Mill Company had drawn on the appellant at arrival for the proceeds "with railroad receipt attached to the draft."

Upon the whole offer, it seems to us clear that it was not the intent of the parties that the title to the flour should pass to the appellant until the draft had been paid.

14. Effect of Transfer of Bill of Lading.

Shaw v. Railroad Company. 101 U. S. 557.

Norvell & Company of St. Louis sold The Merchants' National Bank a draft on Kuhn & Brother of Philadelphia and delivered to it as collateral security an original bill of lading for 170 bales of cotton sold to Kuhn & Brother. The duplicate bill of lading was forwarded on the same day to Kuhn & Brother. The draft was presented to Kuhn & Brother who accepted it, but fraudulently substituted their duplicate bill of lading for the original bill. Kuhn & Brother then indorsed the original bill to Miller & Brother as security for an advance and they, with the approval of Kuhn & Brother, sold the cotton to Shaw & Esrey. The Merchants' National Bank attempts to recover possession of the cotton, Kuhn & Brother having failed.

Held, that the transfer of a bill of lading without authority does not transfer title.

Strong, J.

It does not necessarily follow that, because a statute has made bills of lading negotiable by indorsement and delivery, all consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

The function of [a bill of lading] is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as banknotes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the

true owner, by his negligence or carelessness, may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

15. Effect of Transfer of Warehouse Receipt.

Commercial Bank of Selma v. Hurt. 99 Ala. 130.

Hurt shipped cotton to H. C. Keeble Company, commission merchants, at Selma, with instructions to hold the cotton until ordered to sell. The Keeble Company deposited the cotton in a warehouse, took warehouse receipts in its own name, borrowed money from the Commercial Bank on them, and gave them to the bank as collateral security for money loaned. The Keeble

Company failed. Hurt sues to recover the cotton from the warehouseman, it being also claimed by the bank.

Held, that the transfer of a warehouse receipt does not pass title to goods against the rightful owner.

Walker, J.

Under the common law, a factor or commission-merchant has no implied authority to pledge the goods of his principal for his own use. Unless the result is controlled by some statute, the attempted pledge does not work a divestiture of the title of the principal, and the party receiving such a pledge and advancing his money acquires no right to the property as against the principal, whether he knew he was dealing with a factor or not.

In England, and in several of the States in this country, statutes have been enacted for the protection of third persons who, in good faith and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact, hold it merely as factors or agents, having been intrusted by the owners with possession of the property or of documentary evidence of title to it. Decisions controlled by such statutes have no bearing upon this case, as we have no statute purporting to change the common law rule which protects the owner against an unauthorized pledge of his property by one who, as factor or agent to sell, has been intrusted with the possession and custody of it. No statute is appealed to which could give any color to a claim that an unauthorized pledge by a factor of the property itself which was intrusted to him would have any other effect as against the principal than was accorded to such a transaction by the common law.

The apparent object of the statutory provisions in reference to warehouse receipts is to give them, for the purposes of commerce, recognition and credit as substitutes for the property described in them, and to give dealings in them the same effect as similar dealings with the property itself. We think they are made negotiable only in the sense that in their passage through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. No intention is disclosed to give dealings in them any more controlling effect upon the title to the property they represent than would be given to similar dealings with the property itself. At last, they are mere tokens of possession, and not guaranties of title by the person issuing them. The warehouseman holds himself out as the custodian, for the legal holder of the receipt, of the property mentioned in it, but he does not warrant the title of the property against the claims of strangers to the contract of storage.

As representatives of property, bills of lading and warehouse receipts are instruments of similar character. They are dealt with

as substitutes for the property itself. The assignment of a bill of lading for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more.

Our conclusion is, that it would be a perversion of the manifest purpose of the statute to construe it as having the effect of putting the symbol of the property upon a higher plane, as an evidence of title, than the actual possession of property it describes. The statute does not undertake to make the transfer and delivery of the symbol more than the equivalent of an actual transfer and delivery of the property itself.

B. Risk.

1. Goods at Risk of Owner.

Race v. Hansen. 12 Ill. App. 605.

Race sold Hansen and Pheiffer a cow which he kept in the pasture of a third party. The price was paid and it was agreed that the cow should be left in the pasture for a few days. When Pheiffer came for the cow the next day, she was gone. There was no evidence to indicate how she had escaped, as the pasture was properly fenced. The purchasers sue to recover the money paid.

Held, that after a sale, the risk is in the buyer unless there is fault of the seller.

McAllister, J.

The fence around the lot where the cow was, was reasonably sufficient and secure. There was no evidence tending to show that the cow was removed from the pasture, or disposed of by the defendant, or by any other person, through his direction, permission or authority, or tending to show any negligence or fault on the part of the defendant or any agent or servant, in respect to the cow, while so left in said pasture after the sale.

The subject of the contract being a specific article, when the bargain was struck, and the consideration paid, the transaction became a completed sale which passed the property, and with it the risk, from the seller to the buyer, notwithstanding the arrangement that the cow might remain in the pasture where she was for a specified time.

By the contract of sale and payment of the consideration, the property in the cow passed from the defendant to the plaintiffs, so that from that time she was wholly at the risk of the latter, the former being liable only for want of ordinary care or bad faith as bailee, which contributed to the loss complained of. There was no

evidence in the case tending to prove any want of care or bad faith on the part of the defendant in respect to this property, and consequently no cause of action was shown.

2. Risk on Buyer in Conditional Sale.

Burnley v. Tufts. 66 Miss. 48.

Tufts sold Burnley a soda water apparatus, taking notes in payment, which recited that title should remain in Tufts until all notes were paid. After several had been paid, the apparatus was destroyed by fire without the fault of either party. Burnley refuses to pay the remaining note, claiming that the goods were at the risk of the owner.

Held, that in a conditional sale, the risk is on the buyer.

Cooper, J.

Burnley unconditionally and absolutely promised to pay a certain sum for the property the possession of which he received from Tufts. The fact the property has been destroyed while in his custody and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether if he had foreseen the contingency which has occurred he would have provided against it, nor whether he might have made a more prudent contract, but it is whether by the contract he has made his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do.

C. Rights of Innocent Purchaser from Seller not Having Title.

1. General Rule.

Saltus & Saltus v. Everett. 20 Wend. (N. Y.) 267.

Bridge and Vose consigned lead to a New York firm for Everett, the plaintiff. The ship by which the lead was sent put

into Norfolk in distress. Part of the lead was sold to pay expenses and the remainder sent forward by another ship under a bill of lading running to the master of the first ship. The master fraudulently ordered the lead delivered to another New York firm, who sold the lead to the defendant and received payment. Everett, the owner, sues to recover the value of this lead.

Held, that an innocent third person acquires no right to property unless the vendor has title, or the real owner is estopped to deny the vendor's right to sell.

Senator Verplanck:

The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of bona fide purchasers of personal property, bought without notice of any opposing claim, and those of the original owner divested of the possession or the control of his property by accident, mistake, fraud or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property (a bill of lading indorsed to them), and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong-doing of the third?

The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale imports nothing more than [that] the bona fide purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was that of sales in markets overt, a custom which has not been introduced among us. It has been frequently held in this country that the English law of markets overt has not been adopted, and consequently, as a general rule, the title of the true owner cannot be lost without his consent.

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state that have been cited or referred to, I come to this general conclusion: that the title of property in things movable can pass

from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has, by his own direct voluntary act, conferred upon the person from whom the bona fide vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a bona fide purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. So, again, where the owner gave possession and the apparent title of property to a purchaser who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only, obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority or disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external *indicia* of the right of disposing of his property." Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Again, the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances.

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent.

2. Further Discussion of General Rule.

Barnard v. Campbell. 55 N. Y. 456.

On August 21, Campbell's firm purchased of Jeffries a quantity of linseed, for which it paid. Jeffries, at the time, did not have the linseed. On August 24, he purchased of the plaintiffs, and by fraud induced the delivery of, 1,370 bags of linseed which he delivered to Campbell in fulfilment of his contract of sale. The plaintiffs seek to recover possession, Jeffries having failed on the 27th.

Held, that a purchaser takes only such title as his vendor had.

Allen, J.

That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. The general rule of law is undoubted that no one can transfer a better title than he himself possesses. To this rule there are, however, some exceptions, and unless the defendants are within the exceptions, they must abide by the title of Jeffries.

One of the recognized exceptions applies to negotiable instru-

ments only, and depends for its existence upon the law merchant and the reasons of public policy upon which that branch of the law rests. To make this exception available, the negotiable paper must be actually transferred by indorsement in the usual form and for value. Another exception is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a bona fide purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the instrument, and the necessities of commerce. The bill of lading, for the convenience of trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred.

Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and, even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of like nature, may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner. Jeffries had no bill of lading from the plaintiffs, the vendors of the goods, or any document of like character transferable in the usual course of business, and the transfer and delivery of which to a purchaser for value would have operated as a symbolical delivery of the goods, and been the equivalent of an actual delivery, so as to terminate the right of the plaintiffs to rescind the sale and reclaim the goods.

Another exception to the general rule exists in the case of a sale in market overt; but as we have no markets overt, and there are no sales, public or private, known to our law, which relieve the buyer of merchandise from the rule of *carveat emptor*, as applied to the title, this exception need not be further considered.

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business and upon the ordinary evidences of right and authority in those with

whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and, as against the real owner, declares that the apparent title and authority which exists by his act or omission shall *quoad* persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. But the owner must go further, and do some act of a nature to mislead third persons as to the true position of the title.

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of, it; and, 2, the person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*.

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other of two innocent persons, is made to bear the loss occasioned by the fraud of a third person.*

3. Who are Bona Fide Purchasers.

Hayden v. Charter Oak Driving Park. 63 Conn. 142.

This was an action to compel the defendant to issue a certificate for stock. Harbison had a certificate for 41 shares of stock of the defendant corporation which had been issued to him by mistake. He, however, believed that he was the owner of that amount of stock, and agreed to assign 25 shares to Hayden in settlement of a previous indebtedness which was not in fact discharged. Upon Hayden's application for a new certificate, it transpired that Harbison was entitled to a smaller number of shares than the amount transferred to Hayden, who seeks to compel the issue of 25 shares.

Held, that until payment of consideration, a person cannot become a purchaser for value.

* The authors consider that the application of the law to the reported facts of the case is unconvincing. It is probable that the statement of facts in the report is incomplete. See *Simpson v. Del Hoyo*, *infra*.

Torrance, J.

The important question remains—was the plaintiff a bona fide purchaser for value? If he was not, he stands in no better position than Harbison, and as against him we think the defendant would not be estopped to set up this mistake.

It is perhaps, for the purposes of this case, sufficiently accurate to say that a bona fide purchaser is one who has bought property without notice of the claims of third parties thereto, upon the faith that no such claims exist, and who has therefore actually paid or parted with some valuable consideration or has in some way altered his legal condition for the worse. It is not enough that he has agreed to pay a valuable consideration before notice; he must have actually paid or parted with it before notice. "Notice received before the party has actually paid the money or parted with the other valuable consideration, is a valid and binding notice, and subjects his interest to the prior equity of which he is notified; and this is true even though he has already taken a conveyance of the legal title and has given security for the purchase price, even by an instrument under seal. The reason is that the conveyance of the legal estate is under such circumstances a voluntary one, because the agreement to pay the price and the security given therefor are in reality mere nullities. Not only must there be a valuable consideration in fact, but it must be paid before notice of the prior claim. Notice after the agreement for purchase is made, but before any payment, will destroy the character of the bona fide purchase. It is further settled that there must be actual payment before any notice, or what in law is tantamount to payment—a transfer of property or things in action, or an absolute change of the purchaser's legal position for the worse, or the assumption by him of some new irrevocable legal obligation. It follows, therefore, that his new promise, contract, bond, covenant, bond and mortgage, or other non-negotiable security for the price, will not render the party a bona fide purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity if not at law."

Applying these principles to the case at bar, we think it is quite clear that the plaintiff, before he paid or parted with any valuable consideration to Harbison or had changed his position in any way for the worse, had ample notice of the claims of the defendant, and was therefore not a bona fide purchaser.

4. Estoppel to Assert Title.

Pickering v. Busk. 15 East (Eng.) 38.

Swallow, a hemp broker, purchased for Pickering hemp then lying at a certain wharf. The hemp was delivered to Swallow at the desire of Pickering and Swallow had it transferred to his name by the warehouseman. Later, Swallow sold the hemp to Hayward and Company, who thereafter became bankrupt.

Pickering sues Busk, the assignee of Hayward and Company, to establish his title.

Held, that by his act the plaintiff is estopped from denying the authority of the broker to sell it.

Lord Ellenborough, C. J.

It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Of if one sends goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.

5. What Raises Estoppel.

Johnson v. The Credit Lyonnais Co. L. R. 3 C. P. D. (Eng.) 32.

Hoffman, a tobacco broker, had 50 hogshead of tobacco lying in bond in his name in the warehouse of a dock company, which had issued the warrants to him. Johnson bought the tobacco from Hoffman and paid for it, but left the warrants in his possession without making any change on the books of the dock company. Hoffman fraudulently pledged part of this tobacco with the Credit Company to secure a loan, and gave them the dock warrants as security. Johnson sues to recover the value of the tobacco.

Held, that Hoffman did not have such ostensible authority to sell the goods that the plaintiff was estopped to set up his claim.

Cockburn, C. J.

The case for the plaintiff rests on the general proposition of law—which as a general proposition cannot be contested—that the

mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been.

The defendants, on the other hand, insisted on two grounds as taking the case out of the general rule: first, that the plaintiff, by leaving the possession of the goods and *indicia* of property in the hands of Hoffman, had enabled the latter to pledge the goods to them, and was therefore estopped from denying the right of Hoffman so to deal with them; secondly, that, even if the property in the tobacco still remained in the plaintiff, so as to entitle him to recover its value, on the other hand, the plaintiff had in the conduct in question been guilty of negligence by which the defendants had been induced to deal with Hoffman as the owner of the tobacco, and to pay him for it; by reason of which they were entitled to recover back the amount by way of counterclaim, or what would come to the same thing, to set it off in the present action.

Sitting here in a Court of Appeal, I feel myself at liberty to say that [the] authorities fail to satisfy me that at common law the leaving by a vendee [of] goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor.

The defense, founded on the allegation of negligence, remains to be considered.

That the plaintiff, in omitting to have the goods transferred to his own name, and to have the dock warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt, and I am strongly confirmed in this view by the passing of the recent statute, as the legislature must have proceeded on the view that there is default in the owner in such a case.

But whether this negligence of the plaintiff will, under the circumstances, give to the defendants any ground of complaint which can be enforced in point of law is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. Negligence, to have the effect of estopping the party, must be the neglect of some duty cast upon the person guilty of it. This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of whosoever may have,

however innocently, purchased those goods from the thief, except in market overt. The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least no duty which the law can recognize—either as individuals or as members of the general public.

This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counter claim for the money which they have advanced to Hoffman on the security of the goods.

6. Sale by Thief.

Farquharson Brothers & Co. v. King & Co. (1902) A. C. (Eng.) 325.

Farquharson Brothers gave Capon authority to sign delivery orders in their behalf. Capon fraudulently shipped lumber on such delivery orders to himself as Brown, and posing as Brown sold the lumber to King and Company, who bought and paid for it in good faith. Farquharson Brothers sue to recover its value.

Held, that no title passes under a sale by a thief.

Lord Macnaghten.

The real defense is a singular one. It comes to this: The defendants say to the plaintiffs, "You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune common to you and to us all is all your fault. By your foolish confidence in Capon, and by the written authority you gave him, you 'enabled' him to commit this fraud upon us. And so Ashhurst J.'s famous dictum comes in and you must sustain the loss."

The defense, in my opinion, has no foundation in principle or authority. To try the principle, take a common case—a case which everybody understands. Nothing is better settled than this, that if a person buys a chattel and it turns out that the chattel was found by the person who professed to sell it, the true owner can recover his property, unless there has been a sale in market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog and find it afterwards in the possession of a gentleman who bought it from somebody whom he believed to be the owner, it is no answer to me to say that he never would have been cheated into buying the dog if I had chained it up or put a collar on it or kept it under proper control. If a person leaves a watch or a ring

on a seat in the park or on a table at a café and it ultimately gets into the hands of a bona fide purchaser, it is no answer to the true owner to say that it was his carelessness and nothing else that enabled the finder to pass it off as his own. If that be so, how can carelessness, however extreme, in the conduct of a man's own business, preclude him from recovering his own property which has been stolen from him?

7. Sale by Fraudulent Vendee.

Simpson v. Del Hoyo. 94 N. Y. 189.

Mrs. Del Hoyo was induced by fraudulent representations of Lowenstein to convey real estate to his daughter, who gave him a mortgage on it. This mortgage Lowenstein assigned for valuable consideration to Simpson, who acted in good faith. Mrs. Del Hoyo secured the property again from Miss Lowenstein and now seeks to defend the foreclosure of the mortgage on the ground that the fraud perpetrated upon her made the mortgage invalid.

Held, that when title to property has been acquired by fraud, the fraudulent vendee may pass a good title to a bona fide purchaser.

Earl, J.

When real or personal property is obtained from one by fraud upon the purchase thereof, and the vendor thus intentionally parts with the title, the vendee can always, by a sale to a bona fide purchaser for value, give a title good as against the vendor. If Miss Lowenstein could give a conveyance, good as against her grantor, she could execute a mortgage to one parting with value, and taking it in good faith, which would be equally effectual, as she could have done if the property had been personal instead of real. So if this mortgage to her father had been taken by him for value, and in good faith, he could have enforced the same against the land.

The assignee of the mortgage holds under Miss Lowenstein. He took it on the faith that she, as the apparent owner of the real estate, had the right to execute it. When he took it he could inquire of her whether it was valid and effectual, she at the time having the legal title to the land; and when his inquiries had extended thus far he was bound to go no further.

It would lead to great inconvenience and great insecurity, if persons taking or purchasing mortgages were obliged to go back of the mortgagor who owned the land and had the record title thereto, and at their peril ascertain whether any fraud had been perpetrated upon some prior owner of the land.

It is a familiar rule of law that a fraudulent purchaser of real or personal property obtains the legal title to the property purchased,

and that he may convey a good title to any bona fide purchaser from him for value. He may not only convey the property, but he may deal with it as owner, and may mortgage it; and whoever purchases the property or takes a mortgage thereon from him or under him, in good faith, for value, or deals with him in good faith in reference thereto, will be protected against the claims of the defrauded vendor. The real estate may be conveyed, or a mortgage thereon may be assigned to several successive participants in the fraud, or several successive *mala fide* purchasers. But the moment real estate or the mortgage reaches the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded owner are cut off.

D. Rules Concerning Passing of Title Under Sales Act.

1. General Rules.

Massachusetts Acts and Resolves, 1908. Chapter 237.

Section 19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the

seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section twenty. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon.

2. Effect of Bill of Lading.

Massachusetts Acts and Resolves, 1908. Chapter 237.

Section 20. (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may thus be reserved notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading,

the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading of goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored: *provided* that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

3. Effect of Negotiable Document of Title.

Massachusetts Acts and Resolves, 1908. Chapter 237.

Section 33. A person to whom a negotiable document of title has been duly negotiated acquires thereby:—

(a) Such title to the goods as the person negotiating the document to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had, or had ability to convey to a purchaser in good faith for value; and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment of execution upon the goods by the creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:—

- (a) That the document is genuine;
- (b) That he has a legal right to negotiate or transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the document; and
- (d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or of previous indorsers thereof to fulfil their respective obligations.

Section 38. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

IV.

RIGHTS OF THE PARTIES.

Notwithstanding the fact that title to the goods has passed to the buyer, an unpaid seller, until he relinquishes possession of the goods, has a lien on them (i. e., a right to retain them) for the price. In the following cases the unpaid seller may retain possession until payment, or tender of payment, of the price:

1. When goods have been sold with no stipulation as to credit;
2. When goods have been sold on credit but the term of credit has expired;
3. When the buyer becomes insolvent.

The unpaid seller loses his lien:

1. When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, unless he reserves the property or the right to possession;
2. When the buyer or his agent lawfully obtains possession;
3. By waiving his right to the lien.

The unpaid seller does not lose his lien because he has obtained a judgment for the price of the goods.

In case the buyer becomes insolvent, the unpaid seller has the right to stop the goods in transit if he has parted with possession of them. Goods are in transit from the time they are delivered to the carrier until the buyer takes delivery. Goods are no longer in transit if they are rejected by the buyer while the carrier has possession, or if the carrier holds them as agent for the buyer although delivery has not been made. If the carrier has not actually or constructively delivered the goods to the buyer, it must upon notice of a valid claim of the unpaid seller, redeliver the goods to the seller. This, however, it does at its own risk; for the buyer has an action against a carrier which refuses to deliver goods to which the buyer is properly entitled.

Upon breach of a contract of sale, or of a contract to sell, the parties have the rights of rescission and of action for damages which flow from breach of an ordinary contract. In addition, there are certain remedies in some measure peculiar to the law of sales.

The seller, in event of breach by the buyer, may:

1. Resell the goods under certain circumstances, and recover his loss from the buyer. (See C. 14 *infra*.)
2. Sue for the price.

3. Sue for damages for nonacceptance.
4. Rescind the contract upon notification of his election to do so.

The buyer may:

1. Maintain an action for conversion of the goods if the title has passed, and the seller wrongfully refuses to deliver.
2. Sue for damages for nondelivery.
3. Seek specific performance of the contract, if damages for nondelivery do not afford an adequate remedy.
4. Rescind the contract.

When there has been a breach of warranty on the part of the seller, the buyer may:

1. Keep the goods and set up the breach of warranty by way of diminution of the price.
2. Keep the goods and sue for damages occasioned by the breach of warranty.
3. Refuse to accept the goods, if title has not passed, and sue for damages.
4. Rescind the sale by refusing to accept, or by returning, the goods, and recover any amount paid.

A. Unpaid Vendor's Lien.

1. In General.

Arnold v. Delano. 4 Cush. (Mass.) 33.

Sowerby & Grant purchased wood of Delano, which was measured off but left on Delano's land. A memorandum of sale was made and the wood was paid for by a six months' note. Before the note became due, Sowerby became insolvent. His assignee seeks to recover the value of the wood from Delano.

Held, that upon the vendee becoming insolvent, the vendor's lien revives if he still has possession of the property sold, even though the sale was a sale on credit.

Shaw, C. J.

There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the

vendee, and that actual delivery, by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term *lien* imports that, by the contract of sale, and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation. If the holder is the owner, the right to retain is a right incident to the right of the property; if he have had a lien, it is merged in the general property.

A lien for the price is incident to the contract for sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods until he is paid for them. When a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee becomes bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middle-man, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu*; then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice—one which has given rise to so many cases—lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear, and to illustrate the rule. If the goods are delivered to the vendee's own servant, agent, wagoner, or ship master, that is in law a delivery to the vendee himself. So if goods are stored in a common warehouse, as the dock warehouses at the London docks, and entered in the books as the property of A. B., and deliverable to him, and a dock warrant issued, and afterwards, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D., and entered in like manner in his name, this is an actual change of custody, control and possession, though the goods are not moved from their possession. So if the seller sustain different characters, as if a person, who is a livery stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable, to be kept for C. D. at a stipulated weekly

hire, this may be regarded as an actual change of custody and possession.

But by far the most common case which occurs is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not the servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee, or the ultimate place of destination ordered by him, may be stopped *in transitu* by the vendor; and if he can thus stop them, he regains his lien.

The purchasers had a license to go on to the defendant's land, and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained on the vendor's land, and in his possession, in the same manner as before and at the time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor who had not parted with the possession and custody of the goods sold. And this was the state of things when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

If it might be supposed that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered upon the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties.

2. Lien on Expiration of Credit.

McElwee v. Metropolitan Lumber Co. 69 Fed. 302.

The Metropolitan Lumber Company agreed to sell the product of its lumber mill during the year 1892 to Barker, doing business under the name of Barker & Company, who gave three months' notes for the lumber after it was piled at the mill and measured. These notes were renewed by agreement. After the renewal, Barker, who had previously sold the lumber to McElwee & Carney, became insolvent. McElwee & Carney seized the property as theirs and seek to establish their right to it.

Held, that although title to property has passed, a vendor's lien revives after the term of credit has expired.

Lurton, Cir. J.

The passage of title does not militate against the existence of a vendor's lien. Such a lien arises upon the vesting of the title in the vendee, and is a mere right of the vendor to retain possession until the price is paid. If the title remains with the vendor, there is no lien; and this was explicitly stated to the jury, who distinctly found in their general verdict that the appellee had a vendor's lien. If such a lien existed when appellants replevied the lumber involved, it arose in consequence of facts occurring after the vendee gave his original notes. The agreement to give credit for 90 days after each instalment of lumber was placed in a deliverable condition, and had been inspected and estimated, was wholly inconsistent with any right of the vendor to retain possession until the price was paid. The duty of immediate delivery, credit having been given, was wholly inconsistent with a right to hold as security for the purchase price.

Thus, after the execution to the vendor of the promissory notes of the vendee, the title or right of property and the right of possession to the lumber embraced within each monthly settlement were vested in Barker & Co. The actual, manual possession was with the Metropolitan Lumber Company, which was under obligation to deliver to the buyer as delivery should be required. Delivery could not be refused unless one of two things should occur before the actual possession was surrendered, namely, insolvency of the buyer or nonpayment of the price when the credit expired. In case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien, which had been waived by a sale on a credit, would revive, and the vendor might lawfully retain his possession until the price was paid. Even if goods have been delivered to a carrier consigned to the vendee, and insolvency occur before they reach the actual possession of the buyer, the vendor may exercise the right of stoppage *in transitu* to recover his possession, and thereby revive his lien. The right of stoppage *in transitu* is but an equitable extension or enlargement of the vendor's lien, and is not an independent or distinct right.

Unless, therefore, the actual possession had been surrendered before the alleged change in the contract, to be hereafter considered, the vendor's lien would revive, in case insolvency occurred before delivery or the period of credit expired and the price was unpaid. The effect upon the vendor's right of the expiration of the period of credit while the actual possession is with the vendor is thus stated:

"When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent."

This revesting of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been

negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor. The right of retention is not a right of rescission, and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery. If, after the revival of the vendor's lien by expiration of the credit, the seller extended further credit by taking renewal notes, payable at a future date, the revived lien would be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes. This state of things seems to have been contemplated by the parties; for, by one of the clauses of the original contract, a provision was made for renewals or extensions for such time as the lumber in the actual possession of the vendor when an extension was granted should "remain in the possession" of the lumber company, "not exceeding ninety days." The reasonable construction to be placed upon this provision is that the revived lien, resulting from the expiration of the original credit, should not be waived by renewal of purchase notes and an extension of credit. Before such extension, the buyer undoubtedly had the right of property and right of possession. After such renewals, all right of possession till the renewal notes were paid was lost. Independently of the agreement that extended credit should not waive the lien which had been revived by expiration of original credit, the insolvency which occurred during the running of the renewal notes would operate to revive the suspended lien, and, between vendor and vendee, or a subvendee standing on no higher ground than the vendee, the defendant in error had a right to hold the possession till the renewal notes were paid.

3. Effect of Delivery of Negotiable Receipt on Lien.

Rummell v. Blanchard. 216 N. Y. 348.

Rummell & Company sold Alden & Company on credit 200 cases of shellac stored in a warehouse, for which they gave Alden & Company negotiable warehouse receipts. Before paying for the shellac, Alden & Company became insolvent and Rummell & Company seek the return of the goods from the warehouseman.

Held, that the delivery of a negotiable warehouse receipt gives possession of the goods to the buyer and the unpaid vendor's lien is lost.

Cardozo, J.

The plaintiffs insist that the merchandise was never brought into the possession of the purchasers, and, hence, that they have never lost their lien as vendors for the payment of the price. The effect of the indorsement of warehouse receipts is now prescribed by statute.

Where the receipts are negotiable in form, the holder to whom they have been negotiated acquires thereby "(a) such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and (b) the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him." Where the receipts are not negotiable the holder "acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt," but "prior to the notification of the warehouseman of the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to require the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor." In brief, the warehouseman who issues a negotiable receipt agrees in advance to hold the goods for the account of any person to whom the receipt is negotiated, and by the very act of negotiation loses his position as bailee for the vendor, and is transformed without further assent into a bailee for the vendee. The warehouseman who issues a non-negotiable receipt does not become the bailee for the transferee of the receipt until notice of the transfer. From the moment of the negotiation in the case of a negotiable receipt, and from the moment of notice in the case of a non-negotiable receipt, the holder of the receipt is the bailor, and the warehouseman's possession is for the account of the new owner.

The significance of this statute will become manifest when we consider the law as it stood before the statute was enacted. It was long a mooted question whether the transfer of a warehouse receipt divested a vendor's lien unless the warehouseman had consented to become the bailee for the vendee. Some courts held the view that such a consent was necessary. It might be given in advance, but unless it was given in some form, either before or after the event, the warehouseman, it was thought, remained the bailee of the vendor, and the transfer of the receipt, though effective to change the title, left the possession undisturbed. Whether the transfer of bills of lading had any greater effect is a question not before us. It is true that the rule which we have stated has been criticized; indeed, until the enactment of the statute, we may doubt whether it had been fully adopted in this state. The critics of the rule maintained that the transfer of a warehouse receipt ought to be deemed equivalent to an actual delivery even without the warehouseman's assent; but never was it doubted that a change of possession resulted where the bailee

or agent of the seller had given his assent, and had thereby been converted into a bailee or agent for the buyer. Less may perhaps have been required, but assuredly not more.

When the statute is read in the light of these decisions, its meaning is not doubtful. It charges every warehouseman who issues a negotiable receipt with a direct obligation to any one and every one to whom the receipt has been negotiated. It charges every warehouseman who issues a non-negotiable receipt with a like obligation after notice of the transfer. In the one case, the holder acquires "the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him." In the other case, the holder acquires a like right upon giving notice of the transfer. The assent of the warehouseman to act as bailee is thus written by the law into the contract embodied in the receipt. "By a receipt in that form the bailee assents in advance to becoming bailee for any one who is brought within the terms of the receipt by an indorsement of the same." The moment that a receipt, negotiable in form, is indorsed and delivered, a new relation of bailor and bailee springs into being, and with the birth of that relation the possession, once held by the bailee for the account of the vendor, is transmuted into a possession for the account of the vendee. The result "is a real delivery to the same extent as if the goods had been transported to another warehouse named by the pledgee." With the transmutation of possession the vendor's lien is at an end.

The plaintiffs insist that if they have lost their lien, they may none the less regain possession by the exercise of the right of stoppage *in transitu*. This claim need not long detain us. Merchandise is not in transit unless it has been delivered to a bailee for the purpose of transportation. This merchandise was never delivered to a bailee for that purpose. Since no transit was ever begun, there was none to intercept.

4. Lien not Applicable to Property after Purchaser has Changed its Character.

Douglas v. Shumway. 13 Gray (Mass.) 498.

Rawson sold Benson all the wood standing on certain land belonging to him. Benson gave a note for the purchase price, and mortgaged the wood to Douglas to secure a pre-existing debt. After the wood had been cut, the defendant, a sheriff, attached the property in a suit by Rawson against Benson to assert his vendor's lien. This action is brought by Douglas against the sheriff for the conversion of the wood.

Held, that the seller of standing timber does not acquire an unpaid vendor's lien when the property is changed in form into personal property.

Bigelow, J.

The evidence offered in support of the defendant's claim to a lien as vendor of the wood was rightly rejected. The contract of sale contemplated that the vendee should expend labor and money in felling the trees and preparing the wood for market; and the case finds that the wood had been cut by the vendee, and a portion thereof sold by him and hauled off the land. We think these facts are inconsistent with an existing right of lien in the vendor for the purchase money. We know of no case where such a right has been recognized, after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property. The vendee, by himself and his agents, had taken it into his actual possession, and incorporated with it the labor bestowed by him in preparing it for sale. There was therefore such a change of possession from the vendor to the vendee as to defeat any right of lien in the vendor.

But on another ground we think the verdict must be set aside. A contract for the sale of standing wood, to be cut and carried away by the vendee, is to be construed as passing only an interest in the trees, when they are severed from the freehold. They then pass to the vendee as personal property. Under the contract in the present case the vendee acquired no interest in the land. He could not therefore convey any to the plaintiff by his mortgage. His conveyance could only operate to pass the interest which he had acquired in the trees as personal chattels.

5. Lien Unaffected by Judgment.

Houlditch v. Desanges. 2 Starkie (Eng.) 337.

Vignoni ordered a carriage to be made for him by Houlditch's firm. Vignoni did not take the carriage away when it was completed, and the defendant, a sheriff, seized it upon an attachment in behalf of another creditor of Vignoni. The plaintiffs claim an unpaid vendor's lien, which the sheriff insists was lost by reason of the fact that the plaintiffs recovered judgment against Vignoni for the price.

Held, that recovery of judgment does not destroy an unpaid vendor's lien.

Lord Ellenborough, C. J.

The action was for nonperformance of the contract; if it had been for goods sold and delivered, the case might have been different; as it was, the goods remained in the custody of the plaintiffs undelivered, and the verdict did not entitle the defendant in that action to the specific property before the money was paid. As between the

plaintiffs and the purchaser, in case any hardship accrued to the latter from the detention of the carriage after the verdict and before payment, the case might perhaps be one for the interference of a court of equity, but with respect to the sheriff, the case is different; the plaintiffs were in possession of a carriage unpaid for.

B. Stoppage in Transitu.

1. Of What the Right Consists.

Jones v. Earl. 37 Cal. 630.

Biggs & Jones sold liquors which they instructed the carrier, Earl & Company, to hold, after having found out that the vendee was insolvent. Nevertheless, upon the vendee tendering charges and commissions, Earl & Company delivered the goods. Biggs & Jones sue the carrier for conversion.

Held, that a carrier who delivers goods to a vendee after notification to stop the goods in transit, is liable to a vendor who rightfully stops them.

Sanderson, J.

Stoppage *in transitu* is a right which the vendor of goods upon credit has to recall them, or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired bona fide rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a bona fide right to them. Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for a conversion of the goods, if he decline to redeliver them to the vendor, or delivers them to the vendee. And a notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient. And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier.

2. To What Carriage the Right Extends.

Johnson v. Eveleth. 93 Me. 306.

Ware bought spruce logs from Eveleth, for delivery to himself at Winslow. The logs were floated down the Kennebec by a log-driving company. When only a few had arrived, Eveleth,

upon learning that Ware was insolvent, took possession of the logs from the log-driving company. Johnson, Ware's assignee in insolvency, sues to recover the value of the logs.

Held, that the right to stop goods in transit exists while they are in the custody of a private carrier.

Savage, J.

The question in this connection is, May the right of stoppage *in transitu* attach to logs being driven as these were? We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers. But that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage *in transitu* exists the same as if they are sent by common carrier. The vital question is, Are they in transit between the vendor and the vendee? The right of stoppage *in transitu* is merely an extension of the lien for the price which the vendor has, after contract of sale and before delivery of goods, sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of the carrier, strictly so called, while in transit, or whether they are in possession of a "middle-man," is immaterial. In this case the logs were certainly in transit between the dam at East Outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage *in transitu* has grown. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

But the plaintiff next contends that, so far as this case is concerned, the *transitus* ended when the logs were turned "over the dam" at East Outlet, because, he says, that was the ultimate destination of the logs, within the meaning of the contract of purchase. In view of these circumstances, should "over the dam" be regarded as the "destination" of the logs? We think not.

The question here is not whether the turning of the logs "over the dam" was a delivery, such a delivery as would have vested title in the vendee, in case delivery was necessary. It is not a question

of title. We assume that Ware had the title to the logs. The defendant bases his right of stoppage *in transitu* upon that fact in part. The exercise of that particular right presupposes that the title of the goods is in the vendee; and further, the title remains in the vendee even after the exercise of the right. The title is not changed. The question here is whether by the delivery at the dam, the logs came into the possession of the vendee; and so far only as the delivery at the dam throws light upon this question is it material. The distinction, in a word, is that property sold may have been delivered so as to affect title, and yet not have come into the possession of the vendee so as to bar the right of stoppage *in transitu*. An illustration of this is found in the common class of contracts where the vendor agrees to deliver to a carrier designated by vendee, for shipment to vendee's place of business. A delivery to a carrier under such circumstances vests title in the vendee and places the goods subject to his risk, but the vendor does not lose his right of stoppage *in transitu* while the goods are in transit to the vendee. In a case where goods were delivered to the purchasing agent of the vendees to be transmitted to the vendees' factory in another state, it was held that the right of stoppage *in transitu* was not barred. The court said that the delivery of the goods was to the agent, not as owner, nor as agent of the owners to dispose of them in any other way than to transmit them to the vendees' place of business, and that to take away the right of stoppage *in transitu* there must be an absolute delivery to the agent for the use of the vendees, and it must have been a full and final delivery, as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal. To terminate the *transitus* by delivery to a middle-man, it must be a delivery not to transport, but to keep.

3. Termination of Transit.

Cabeen v. Campbell. 30 Pa. St. 254.

Seidel consigned steel blooms to Cabeen & Company for Chevrier. After a part of the consignment had been delivered to Chevrier, the remainder was attached by Campbell & Company in the hands of Cabeen & Company in a suit brought by them against Chevrier. Immediately afterwards, Seidel, upon finding out that Chevrier was insolvent, notified Cabeen & Company to stop the goods. Campbell & Company sue to establish their lien.

Held, that goods may be stopped in transit by an unpaid vendor until such time as the carrier holds the goods as agent of the vendee.

Strong, J.

The right of a vendor to arrest goods sold, while they are *in transitu* to the vendee, is a right eminently favoured by the law. So strongly is it maintained that the vendor is permitted to resume

his possession by any means not criminal, while the property is on the transit. No intervening attachment or execution against the vendee will defeat the right; or be allowed to interpose any obstacle to the vendor's resumption of possession. Nor is this indulgence to the seller without substantial reason. It is grossly inequitable that his goods, before having reached the hands of the vendee, and before payment, should be appropriated to the satisfaction of other creditors, when the vendee becomes insolvent. In accordance with this obvious dictate of natural justice, therefore, so long as the goods are on their way to the vendee, and while they are in the hands of a middleman, or a carrier, the equitable lien of the vendor remains a lien which he may enforce by arresting the further transit in any way, even by a simple notice.

But when the transit is once at an end, and the delivery is complete, the lien of the vendor is gone. Therefore the right to arrest the goods ceases. The question therefore ever is, where does the transit end? The answer to this question would be attended with no difficulty, were it not that the law recognizes a constructive delivery as sufficient to defeat the vendor's lien. What is, and what is not, a constructive delivery, is often not easy to determine. Until the goods have arrived at the place of ultimate destination, understood as such between the buyer and seller, they are ordinarily liable to stoppage. But when an intermediate delivery occurs, before they reach their ultimate destination, if the party to whom they are delivered has authority to receive them, and give to them a new destination not originally intended, the *transitus* is at an end. They have then reached the ultimate destination intended by both buyer and seller. But if the middleman be a mere agent to transmit the goods in accordance with original directions, the vendor's right continues. The rule may be stated as follows: If in the hands of the middleman they require new orders to put them again in motion, and give them another substantive destination; if without such new orders they must continue stationary, then the delivery is complete, and the lien of the vendor has expired.

What then was the character of the agency of Cabeen & Co., the middleman, in this case? Were they agents for custody alone, or were they agents for transmission? If the latter, then Seidel's right to stop the blooms continued until they should reach Trenton, where the buyer lived, or until they should come into Chevrier's actual possession. We think the case stated shows them to have been agents for transmission, and that Trenton was the ultimate destination intended by the vendor and vendee.

4. Termination of Transit.

Bethell & Co. v. Clark & Co. L. R. 20 Q. B. D. (Eng.) 615.

Clark & Company sold hollow ware to Tickle & Company, who ordered it consigned to a certain ship "to Melbourne." Upon

finding out that the buyer was insolvent, the sellers tried to stop the goods in transit before the goods arrived on the ship, but were unable to do so. They did stop them in the hands of the master of the ship, and the question arises between the trustees of the purchasers and the sellers whether the transit had ended.

Held, that until fresh directions are given by the purchasers for a new transit, the goods may be stopped by the seller.

Lord Esher, M. R.

In this case the vendors being unpaid and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods while *in transitu*, although the property in such goods might have passed to the purchasers. The doctrine of stoppage *in transitu* has always been construed favourably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit. The question is, under which of these heads the present case comes. In this case the contract does not determine where the goods are to go. It is argued for the vendors that directions were given by the purchasers to the vendors that the goods should be forwarded by carriers to Melbourne, so that while they were in the hands of any of the different sets of carriers who would necessarily be employed in so forwarding them, and until they arrived at Melbourne, they were still *in transitu*. The question, whether that is so, is a question of fact in the particular case. Here we have a ship loading in the docks for Melbourne, and the captain would have no authority to receive goods on board as a warehouseman, or for any purpose but to be carried to Melbourne. The meaning is that the goods were to be delivered on board to be carried to Melbourne. What would be the

mode in which they would be so delivered? They would be put on board and the mate's receipt would be taken for them, the terms of which would show that the goods were received for carriage to Melbourne, and a bill of lading would afterwards be signed in the terms of such receipt. That is what was done here.

It follows, in my opinion, that those goods were in the hands of carriers as such, and in the course of the original *transitus* from the time they left Wolverhampton till they reached Melbourne. The case therefore falls within the doctrine of stoppage *in transitu*, and is not within the class of cases where goods going through the hands of a number of carriers, at some stage in the process fresh directions are required from the purchaser as to further carriage.

5. Effect of Assignment of Bill of Lading.

Newhall v. The Central Pacific Railroad Co. 51 Cal. 345.

Hart & Company sold goods to Adelsdorfer Brothers, and shipped them over the defendant road. The sellers notified the defendant that the consignee had failed and that they stopped the goods in its hands. Immediately after this, Adelsdorfer Brothers assigned the bills of lading to the plaintiffs, who were not aware of the insolvency of Adelsdorfer Brothers, nor of the notification. They demanded delivery of the goods from the railroad but delivery was refused. They now sue for that refusal.

Held, that a seller loses his right to stop goods in transit if an innocent purchaser buys them by bill of lading which he takes without notice of stoppage.

Crockett, J.

There are numerous decisions, both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods *in transitu* will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here. But it is important to ascertain the principles which underlie these decisions, that we may determine to what extent, if at all, they are applicable to the case at bar. The first, and, as I think, the controlling point determined in these cases, is, that by the bill of lading the legal title to the goods passes to the vendee, subject only to the lien of the vendor for the unpaid price; which lien continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit.

On the failure of each of these conditions, the right of stoppage is gone, and the lien ceases, even as against the vendee. But it is

further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a bona fide purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well known principle that a secret trust will not be enforced as against a bona fide holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal right will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, "without notice of such circumstances as render the bill of lading not fairly and honestly assignable," has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee.

These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made before the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made after the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person who takes an assignment of a bill of lading "without notice of such circumstance as renders the bill of lading not fairly and honestly assignable." The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier—it may be on some remote portion of the route—that the goods are stopped *in transitu*. If a person taking an assignment of a bill of lading is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated.

6. Right not Lost by Wrongful Dispossession.

McGill v. Chilhowee Lumber Company. 111 Tenn. 552.

Youmans Lumber Company sold to the Chilhowee Lumber Company lumber which was stopped in transit before it reached

its destination, but after the Chillhowee Lumber Company had become financially embarrassed. The Youmans Lumber Company took possession of it and stored it within a short distance of the Chillhowee Lumber Company's property. The Chillhowee Lumber Company then informed the person with whom it had been left that the lumber belonged to it, and thereupon took part of it away. Later, the Chillhowee Lumber Company assigned the rest of the lumber as a security for a debt to a third party, not an innocent purchaser, who shipped most of it away. The rest was subsequently washed away by a flood. In a general creditors' bill, the question arises as to the property rights in this lumber.

Held, that the right of a seller to stop in transit is not lost by wrongful dispossession of the property.

McAlister, J.

While it is true that the seller's lien is dependent upon possession, it is also true that it is not extinguished by a wrongful dispossession of the property. The Court of Chancery Appeals has found as a fact that "the Chillhowee Lumber Company wrongfully and without authority went upon the yard of Mr. Baugher, and by false representations assumed to take possession of said lumber." Such a wrongful and fraudulent dispossession did not operate to extinguish the seller's lien. "The change of possession must be voluntary to constitute a waiver of the lien. Therefore, where such a change is effected by force or fraud, or without the consent of the lienholder, the lien is not thereby determined."

It is also true that the Youmans Lumber Company was entitled to regain this possession from the wrongdoer. "So, if by artifice or evasion the buyer obtained possession of the goods, as upon a promise or understanding of immediate payment, which afterwards is evaded or denied, the seller, who has done nothing to estop himself or waive his right, may regain possession by virtue of his lien as against any one but a bona fide purchaser for value."

The Court of Chancery Appeals has found as a fact that the Southern Brass & Iron Company was not an innocent purchaser, and this exception to the rule is therefore eliminated from this case. In respect of the remedy of the lienholder to recover the possession of this property, the law is thus stated, viz.: "If the property is wrongfully taken from the custody of the lienholder by a third person, the lienholder's remedy is by an action to recover the possession or for a wrongful conversion. In the latter action the measure of damages is the amount of the lien, not exceeding the value of the property."

The full scope and meaning of the doctrine is that the seller is not to be prejudiced by the exercise of his right of stoppage *in transitu*, but may enforce his contract of sale against the purchaser. Until the seller has relinquished his right of possession to the pur-

chaser, the latter cannot, of course, communicate any title to the property so as to defeat the seller's lien.

C. Rights Accruing Upon Breach of the Contract.

1. Rights of Seller in General.

Van Brocklen v. Smeallie. 140 N. Y. 70.

Van Brocklen agreed to sell Smeallie his undivided third interest in a partnership. Smeallie without justification refused to perform his part of the contract. Van Brocklen then sold his share for a smaller sum than Smeallie had agreed to pay, and now sues Smeallie for the difference.

Held, that when the buyer refuses to pay the price, the seller may resell the property and sue the buyer for the difference.

Finch, J.

In this court the rule of damages for a breach by the buyer of a contract for the sale of personal property, is perfectly well settled. The vendor of personal property has three remedies against the vendee in default. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. The rule applies not only to cases where the title passes at once, but also to cases where the contract is executory but there has been a valid tender and refusal. Where the second method is adopted and the vendor chooses to make a resale, that need not be at auction, unless such is the customary method of selling the sort of property in question, nor is it absolutely essential that notice of the time and place of sale should be given to the vendee. Still, as the sale must be fair, and such as is likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit it.

In this case, the vendor acted strictly within the authority of our repeated decisions, and must be protected unless we are prepared, after misleading him, to reverse in some degree our own doctrine deliberately declared. What is now said is that we ought not to extend the vendor's right of resale to a species of personal property such as is involved in the contract before us. That is an erroneous and misleading statement of the problem. The adjudged rule covers every species of personal property. We have said of it that it is founded in good sense and justice, and that it "is the same in all sales, and in respect to property of every description." The rule, therefore, needs no extension since it already covers the present case.

2. Right of Resale.

Massachusetts Acts and Resolves, 1908. Chapter 237.

Section 60. (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transit may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or upon the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized by this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or of the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place thereof should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

3. Right to Resell Goods Stopped in Transit.

Diem v. Koblitz. 49 Oh. St. 41.

Diem sold Koblitz Brothers a large quantity of paper bags, for which they gave notes. Afterwards, upon finding that Koblitz Brothers were insolvent, Diem canceled his delivery of the bags, exercised his right of stoppage *in transitu* and disposed of the bags before the notes became due. Koblitz Brothers now sue for damages resulting from that cancellation and resale.

Held, that the insolvency of a buyer justifies the seller in reselling goods stopped in transit.

Williams, C. J.

We do not understand it to be claimed that the defendant, upon

learning of the plaintiffs' insolvency, might not lawfully retake the goods while they were yet in the custody of the carrier; nor that he was bound to deliver any part of the goods so long as the insolvency of the plaintiffs continued. The claim is, that the right of the vendor in such case is simply to retain possession of the property until the purchase price is paid; and therefore, a resale by him before the expiration of the credit puts it out of his power to deliver to the first vendee, and so constitutes a breach of the contract with him, for which he may, though insolvent, maintain a special action for damages. Whether this claim is correct or not, is the principal question in the case.

The right of stoppage *in transitu* is the right of the vendor to resume possession of the goods sold, while they are in transit to the vendee, who is insolvent, or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if before the stoppage *in transitu* he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency. Nor is the vendor's right abridged, or in any way affected by the fact that he has received the vendee's bills of exchange, or other negotiable securities for the whole price, even though they have been negotiated and are still outstanding. It seems to be well settled that when the right of stoppage *in transitu* is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them, or perform the contract on his part.

When, by the contract, the property is to be delivered at a future day, and the vendor sells it to another before that time arrives, the vendee being able to perform may have an immediate action; for the vendor, by thus disabling himself from performing by delivery at the proper time, commits a breach of the contract, and the vendee need not wait until the time for the delivery arrives. But that rule has no application here. The obligation of the vendor, under a contract like that between the parties in this case, is to deliver the goods at the time stipulated in the agreement, which is at once, upon the receipt or tender of the purchaser's commercial paper, or within a reasonable time; not at the time to which the credit is extended. The right of the vendee is to receive the goods at the time the vendor contracts to deliver them, and he is not bound to receive them at any other time. The breach therefore, on the part of the vendor, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time, and not upon a resale subsequently made; and the vendee's cause of action arises, if at all, upon the failure to deliver, and not on the resale. In the case now before

us, the averments of the defendant's answer, which on the trial he was not permitted to prove, though he offered to do so, show that at the time the goods were to have been delivered, according to the contract of sale, the plaintiffs were insolvent, and their paper dishonored, so that the condition upon which their right to the goods depended had not been performed by them, and they were without the necessary ability to perform the same. Upon what just principle can the seller in such a case be required to hold the goods until the expiration of the credit? It is true that at that time the vendee may again be solvent, and able to pay. There is no presumption or assurance that he will. If any presumption arises, it is rather that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the meantime, which, in many instances must ensue if the seller is compelled to keep the goods shut up, and take the risk of the future solvency of the buyer. The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that character until the termination of the credit. It is insisted, however, that the right of sale in such cases constitutes an exception to the rule. In our opinion, the reason upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and if not available for those purposes, at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable to subject the vendor to the loss in the one case, than in the other. The right of resale ought not, we think, be made to depend upon the degree or extent of the loss that must ensue, if it should be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice; but that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default. We see no good reason for holding that the rights of the seller are any the less where the sale is upon credit, and the property is retained by him on account of the buyer's insolvency, than they would be if the sale were for cash, and the vendee was unable to pay the price agreed upon. In either case the incapacity of the vendee to perform his part of the agreement, and insolvency is incapacity, warrants the vendor in withholding performance on his part.

4. Right of Carrier to Resell.

Alabama Great Southern Railroad Company v. McKenzie.
139 Ga. 410.

McKenzie and Towers shipped peaches from Alabama to Providence over the road of the defendant company. The peaches were delayed on the way, and when delivery was tendered, the consignee refused to take them. The railroad company then had the goods sold for a price which was not enough to pay freight charges. McKenzie and Towers now sue the road for failure to transport the peaches promptly.

Held, that a carrier has no right to sell perishable goods without notification to the shipper, when possible.

Evans, P. J.

A bailment of goods to a carrier confers no power of sale; the contract relates to their transportation, and the carrier has no implied right to sell them under ordinary circumstances. If the consignee rejects the goods, the carrier's liability as such ceases, and he becomes liable as warehouseman. As such warehouseman he is chargeable with the duty of notifying the consignor of the consignee's refusal to accept the goods, and with the further duty of holding the same subject to the order of the consignor. It matters not whether the cause of the rejection of the goods by the consignee be attributed to their damaged condition or to the consignee's arbitrary refusal to accept delivery. A consignee cannot abandon the goods to the carrier because they may be in a damaged condition, where that condition is not such as to practically destroy their value. When the carrier offers delivery to a consignee who refuses to accept the goods, the carrier is chargeable with the duty of notifying the shipper that the goods are held subject to his order. After rejection by the consignee the carrier holds the goods for the consignor; and it would be a breach of trust for the carrier to sell the shipper's goods without notice to him, unless the stress of circumstances be such as to justify the carrier in assuming the place of the owner respecting the preservation of the goods or the protection of the owner. An exception to the general rule which permits the carrier to sell the goods in case of an emergency was first evolved in fixing the liability of a carrier by sea. "In every contract to carry freight there is an implied obligation on the part of the shipowner that in the event of any disaster happening to the ship or cargo in a port where correspondence cannot be had with the freighter, the master shall act as his agent and use his best efforts for the protection and preservation of the cargo. He must in such an emergency put himself in the place of the owner of the cargo, and do what the latter, as a prudent man, would himself do for his own interest if he were present." The exception rests upon an impossibility to give notice to the shipper, and an emergent condition

requiring the prompt exercise of discretion by the carrier. Though the goods be perishable, nevertheless the shipper must be notified, whenever practicable, before the carrier may legally sell them. "In order to justify the act of the carrier in making a sale of the goods, and to establish his title to them, the purchaser must show that there was a necessity for the sale, arising from the perishable nature of the property, which made its preservation for the owner impracticable, or that, from that or some other cause, it was neither possible to proceed with its transportation nor to store it; that the carrier has acted in good faith and with sound discretion; and that it was impossible to communicate with the owner and to receive instructions from him as to the course to be pursued, without occasioning a delay which the circumstances and condition of the property would not admit. And whether, under all the circumstances, these conditions existed to justify the sale, is, when the action is one at law, a question of fact to be determined by the jury, under proper instructions by the court."

The evidence discloses that no effort was made by the carrier to notify the shipper that the consignee had rejected the peaches.

5. Necessity of Tender Before Resale.

Davis Sulphur Ore Co. v. Atlanta Guano Co. 109 Ga. 607.

The Ore Company agreed to sell the Guano Company sulphur ore, which the Ore Company then purchased in Europe and shipped to this country. Before arrival, the Ore Company found that the Guano Company had become insolvent, stopped the ore in transit, and sold it for less than the price agreed upon with the Guano Company. The Ore Company now sues for the difference in price without having tendered the ore or demanded payment.

Held, that unless he tenders performance, a vendor who resells property is not entitled to damages incurred.

Simmons, C. J.

If the vendor resells the goods at the vendee's risk, and the sale is properly made after due notice to the vendee of the intention to resell, and the goods bring less than the contract price, the vendee is conclusively bound by the resale and the amount realized by it. Unless the vendee has notice of the intention to resell, he is not bound by the amount realized, and this is right upon both principle and justice. The vendor acts as the agent of the vendee in making the sale, and sells at the vendee's risk; and it would be unjust to hold the vendee bound except where he has had notice of the intention of the vendor to resell. If the vendee has notice he may attend the sale, if a public one, and see that it is fair, or, whether the sale be public or private, he may be able to bring about competition or to secure a purchaser who will give the full value of the goods. He may be able in other ways to prevent loss to himself. Some of the cases hold

that the resale is in the nature of an adjudication against the vendee, when he has had full notice, as to the value of the goods at the time of such resale. If this be so, it is certainly necessary that the vendee should have notice of the sale. "Notice to the buyer of the time and place of resale is usual, and is important as tending to prove the sale a fair one; but it is not absolutely necessary in all cases that such notice should have been given. But although a notice of the time and place of resale may not be absolutely necessary, it is now generally thought that the vendor should inform the buyer that he intends to exercise his right of resale and hold him responsible for the difference in price." "In order to conclude the [purchaser] in this manner, not only must it appear that the resale was made without unreasonable delay, with the same publicity and as far as possible under the same conditions as the first, and with an honest effort to get the best price obtainable, but it must appear also that the defendant had notice that the sale was to be at his risk. The property resold at his risk is regarded as in some senses his own, and the result of the resale is in the nature of an adjudication against him; and before he should be charged with the deficiency, he should be afforded an opportunity to protect his interest and prevent a sacrifice of the property. Unless notice is given him that the property is held and will be sold at his risk, he has a right to assume, if it is sold again, that the vendor elected to retain and deal with it as his own and at his own risk." In order to entitle the vendor to proceed by resale, instead of by rescission or by action for the whole price, he must manifest his election by preliminary notice of his intention to sell, stating in terms or effect that he will assert his right of resale and bind the buyer by the price obtained and hold him for the loss sustained. The vendee is not bound for the difference between the contract price and the price on the resale, unless he has notice of the vendor's intention to resell and to hold him bound for the difference, or unless his refusal to take the goods when tendered or to pay for them has rendered the notice superfluous. It may be said that the [rules should] apply only to the case of a solvent vendee who refuses to accept and pay for goods, and that they do not apply to cases where the vendee has become insolvent after the purchase or where the vendor has exercised his right of stoppage *in transitu*. We cannot see that either of these circumstances should affect the question of notice. If the vendee becomes insolvent, he ought in justice and good morals to refuse to accept goods for which he cannot pay. When the vendor stops the goods *in transitu*, it appears from the authorities that such stoppage does not amount to a rescission of the contract but puts the vendor back in possession of the goods to hold them, not only to protect his lien for the purchase-money, but also as in the nature of a pledge. When he afterwards exercises his right to resell, he does so as the agent of the vendee and at the latter's risk. The insolvency of the purchaser may relieve the vendor of the necessity of tendering the goods and demanding payment, but notice of an intention to resell is still required.

6. When Tender Must be Made.

Gruen v. Ohl & Co. 81 N. J. L. 626.

Ohl & Company agreed to sell Ellis a press, for which Ellis did not pay and which Ohl & Company later sold to the Leonard Works. Ellis assigned the contract to Gruen, who sues for damages for failure of Ohl & Company to deliver the goods upon demand. The defense rests upon the failure of Ellis to tender payment before Ohl & Company had sold the goods to another party.

Held, that a vendor of property must within a reasonable time tender delivery of the property agreed to be sold.

Swayze, J.

Although the contract involved in this case was made before the passage of the Sales Act of 1907, it is convenient to take the statement of the law from that act, which was, as far at least as this case is concerned, only a codification of the already existing law. The rule as to delivery is thus stated in section 43: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery." In the present case, there was no special agreement as to the place of delivery. The contract was for the sale of specific goods which were to the knowledge of the parties in the A. J. Ellis Company factory; that place then was the place of delivery. Since the goods were left by the vendor at the place of delivery, it was open to both parties to claim an actual delivery by which the title passed to the vendee. Whether a delivery was thereby effected was a question depending on their intent, and both parties have treated the case as if there were no delivery. They have themselves treated the contract as an executory contract of sale—the vendor on his part by assuming to remove the goods and selling them as his own, and the vendee by bringing this suit for damages for breach of the contract instead of a suit in trover or replevin for the goods. Under an executory contract of sale, delivery of the goods and payment of the price are concurrent conditions, unless otherwise agreed, and the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods. Before either party can put the other in default he

must tender performance on his part. The defendant failed to tender delivery, and although he might have left the goods in the factory and treated that as a delivery upon which the purchase price would become due, he took a position inconsistent with that, and thereafter failed to put Ellis in default; for although he made an unsuccessful effort to demand the purchase price, the evidence fails to show an offer to deliver the press. Ellis, on his part, tried to put the defendant in default by the letter of his attorney on January 11th, but this letter was written after the defendant had sold the goods to the Leonard Sheet Metal Works, and a tender of the purchase price at that time was unnecessary, since it was nugatory. The defendant had incapacitated himself from performance on his part. It is urged on behalf of the plaintiff in error that a tender of the purchase price by Ellis after January 4th, when he assigned his contract to Gruen, is unavailing, because not made by the party interested as vendee; but since a tender was not necessary, this question is unimportant. The contract was assignable, as it was a mere contract for the sale of a specific article and no personal element was involved. The assignee, the present plaintiff, before he could maintain an action was obliged to prove a breach of the defendant, and since no time for delivery was fixed, the defendant was entitled, as the judge charged, to a reasonable time within which to make delivery. Such is expressly declared to be the rule by the statute where the contract requires the seller to send the goods to the buyer. This rule is applicable in a case like the present, where, although the goods are specific goods and are in a certain place to the knowledge of the parties at the time of the contract, they are subsequently removed by the seller. Such, too, was the law prior to the passage of the act. The defendant, however, without trying to make a delivery, sold the goods to a third person. It was therefore unnecessary for Gruen to tender the purchase price, since that would have been as the judge told the jury an idle ceremony. It is the defendant's incapacity to perform, not the plaintiff's knowledge thereof, that excuses performance on the part of the plaintiff.

7. Right of Rescission.

Hayes v. City of Nashville. 80 Fed. 641.

Hayes & Sons, brokers, agreed to take bonds of the city of Nashville, and deposited a sum of money to guarantee performance of their obligation. They took only a portion of the bonds and refused to take the rest. They now sue to recover the amount deposited on the ground that the city, by giving them notice of rescission of the contract, put the entire contract at an end.

Held, that there may be an abandonment of a contract not amounting to rescission, and although the parties may use words

indicating a rescission, the court will construe them as indicating an abandonment, if that is the intent of the parties.

Taft, Cir. J.

It was first contended on behalf of the plaintiffs in error that the city could not claim damages for breach of the contract, by way of set-off, because its action in annulling the contract was a complete rescission of it, releasing each party from every obligation under it, as if there never had been a contract made. It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment.

It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases, courts consider not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used.

We cannot suppose that the city, in making this contract, intended to reserve to itself only the right completely to destroy the contract, and thus to obligate itself to give up to the defaulting party the indemnity it had been careful to secure against loss; and yet such must be the construction of the contract, if the annulment provided therein means a complete rescission. The obvious intent of the parties was that upon default the city might free itself from any obligation thereafter to deliver the subsequent installments of bonds to W. J. Hayes & Sons, and that the fund deposited should be an indemnity against any loss the city might suffer by reason of the default. And it was in accordance with such an intent that the city declared its annulment of the contract, for it appropriated to itself the \$3,750 which still remained on deposit as indemnity for the performance of the contract. The declared intention of the city to retain its deposit can only be reconciled and made consistent with its declaration of annulment by construing the latter to be merely an abandonment of the contract, and not a complete rescission.

8. Right of Rescission for Breach of Warranty.

Milliken v. Skillings. 89 Me. 180.

Milliken agreed to sell the defendant sweet corn at \$1 per dozen cans. In an action to recover the balance due after delivery, the defendant seeks to set off for cans furnished under the agreement. He further claims that the corn had no market value, and that he had rescinded the contract on account of a breach of warranty.

Held, that in order to rescind for breach of warranty, the purchaser must have tendered the goods back to the seller.

Whitehouse, J.

It is undoubtedly settled law in this state that a sale of personal property with a warranty of quality, and without fraud, may be treated as a sale upon condition subsequent, at the election of the purchaser; and in the event of a breach of the warranty, the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith.

But the right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract. "Where a contract is to be rescinded at all it must be rescinded *in toto*, and the parties put *in statu quo*." And this rule which makes it the duty of a buyer, who would rescind a contract for breach of warranty of quality, to restore the seller substantially to his former position, necessarily requires him to return or tender back to the seller whatever of value to himself, or the other, he has received under the contract. For breach of warranty the vendee may "rescind the contract and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover."

The law, however, requires neither impossibilities nor idle and useless ceremonies. So if the buyer's offer to restore the goods is met by an absolute refusal of the other party to receive them if tendered, he will be relieved of the duty of actually returning or tendering them to the vendor at the place where the title passed.

"The party seeking to rescind must ordinarily restore or offer to restore whatever he has received under the contract; and in case of the refusal of the wrongdoer to receive it, an offer to restore, properly made, is equivalent to actual restoration." In the discussion of this question the word "offer" is frequently used by courts and text-writers as synonymous with "tender," and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to heavy articles of mer-

chandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase "offer to return" is more commonly and more aptly employed to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered. The principle controlling the restoration of the *status quo* in this class of cases is essentially the same as the ordinary rule in regard to the requisites of a valid tender, with respect to which all the authorities agree that there must be an actual production of the money, or its production must be expressly or impliedly waived.

It has been seen that the defendant did not claim that he ever returned or tendered the goods to the plaintiff at his place of business, or that he was relieved from so doing by any refusal of the plaintiff to accept them if tendered there. When the defendant says he told the plaintiff the corn would be of no use to him and he wanted him to take it back, the plaintiff only made a counter proposition that he would take some sample cans home and see what he could do with them. This was clearly insufficient to constitute a rescission.

9. Right to Sue for Price.

Fisher Hydraulic Stone and Machinery Co. v. Warner. 233 Fed. 527.

The Machinery Company agreed to sell Warner a concrete mixer to be installed by Warner, who was also to receive the exclusive right to sell that machinery within a limited territory. Warner refused to complete the contract, after he had paid \$500 on it. The Machinery Company sues for the price.

Held, that in case of a breach of a contract to purchase an article having no established market value, the plaintiff may recover the price.

Hand, Dis. J.

No testimony was offered as to the market value of the machinery which the plaintiff is still holding in storage for the account of the defendant. The District Judge found that the defendant had broken his contract, but that the measure of damages was the difference between the contract price and market price, and, as no evidence of the market price was offered, awarded judgment for the plaintiff for nominal damages.

The old rule of damages was that if a purchaser refused to take goods according to his contract, the only damages which could be recovered where title had not passed was a sum equivalent to the difference between the contract price and the market price of the goods, for the reason that "the seller can take his goods into the market and obtain his price for them." The courts for years had refused to allow the seller to recover the purchase price because such a remedy treated the failure of a vendee to accept goods as equivalent to a sale and delivery by the vendor, and thus, in effect, granted specific performance in aid of the vendor when law courts were supposed to be clothed with no such power in respect to ordinary contracts for the sale of merchandise. The whole question is a puzzling one, and the decisions in the American courts are in conflict. The difficulty is increased by the fact that there was no testimony offered at the trial to show that the machinery had no established market value. The trial court found that the "machinery when made undoubtedly had a certain kind of market value, but limited and restricted, and not the ordinary market value of articles of commerce." It would seem that this court can take judicial notice of the fact that expensive machinery and fittings not yet installed, made up of many parts, and manufactured to be placed in a plant, do not have a stable market value, particularly when apparently covered by patents.

This is a case, therefore, where the seller has prepared goods of a special kind, and not one where he could "take his goods into the market and obtain his price for them."

The earliest case perhaps where a vendor recovered the purchase money against a vendee who refused to accept the article sold was [one where] the defendant had orally agreed to purchase a sulky to be manufactured by the plaintiff for him which the defendant arbitrarily refused to accept. The discussion was principally as to the statute of frauds and the court awarded the vendor the purchase price. While the cases of contract to manufacture an article have always been treated in the law of sales as *sui generis*, they seem to have been the source of the New York doctrine, which now goes the whole length of allowing any seller to recover the purchase price when the buyer refuses to accept the goods and the seller has held them for the vendee's account, irrespective of whether title has passed or not.

We do not need to go as far as this, and prefer to limit our decision to cases where the goods are of a special kind, having no ordinary market value.

10. Rules for Determination of Measure of Damages.

Kingman & Co. v. Western Mfg. Co. 92 Fed. 486.

The Western Manufacturing Company agreed to sell Kingman & Company agricultural implements of a special character to be

made for them. Some of these implements the Western Manufacturing Company tendered to Kingman & Company, who refused to take them and declined to go on with the contract. Other implements were never tendered and in fact had not been made by the Western Manufacturing Company, which sues to recover for breach of the contract.

Held, that the plaintiff is entitled to recover the difference between the amount which it would cost to manufacture the goods and the contract price.

Sanborn, Cir. J.

The court below, over the objection of the plaintiff in error, gave to the jury the rule for the measure of the damages of the defendant in error which would have been applicable if it had proved the manufacture and tender of all the goods. It charged them that, if they found for the defendant in error, it was entitled to recover the difference between the contract price and the market value of all the articles covered by the contract, whether they had been manufactured or not at the time of the breach. The principal question in the case is whether this was the true rule for the measure of the manufacturer's damages which resulted from the failure of the purchaser to order and take the 600 cornshellers and the 1,200 end gates which it had not made, or commenced to make, when the purchaser refused to order or take any more implements under the contract.

Compensation is the true measure of damages. The injured party may recover what he loses by the breach of his contract, but he cannot recover more, and his recovery must always be limited to the losses which he necessarily suffered from the breach. After he has received notice that the defaulting party will not perform the contract, he may not unnecessarily incur further liabilities or expenses in its performance, and then charge the increased loss he thus incurs to the defaulter.

The following rules for the measure of damages for the breach of a contract to manufacture and deliver articles will be found to be sustained by the authorities, based upon the rule of compensation, just and applicable to the facts of this case:

1. The measure of damages for a breach of contract to purchase personal property is the difference between the market value and the contract price of the property at the time of the breach, if the latter be greater than the former.

2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer, but it is not the true rule for the measure of damages resulting from the breach on account of those not then made and ready for delivery.

3. Where materials have been purchased and labor has been

bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value.

4. If materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and the market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost.

5. The measure of the damages upon articles covered by such a contract for which no materials had been bought, and upon which no work had been expended at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that price is greater than the cost.

The application by the court below of the general rule for the measure of damages upon a breach of a sale of personal property to the measure of the damages for a refusal to take from the manufacturer in this case articles that had never been made under the contract, was erroneous, and compels a reversal of the judgment.

II. Damages in Stock Transactions.

Galigher v. Jones. 129 U. S. 193.

Jones, a stock broker, sues Galigher, a customer, to recover a balance due on account of stocks purchased for the account of Galigher. Galigher had telegraphed orders to Jones to sell certain stock and transfer the proceeds to other stock on a certain day, orders which Jones had not executed and concerning which he had not communicated with Galigher. Galigher seeks to set off the loss occasioned him by the failure of Jones to comply with these orders.

Held, that the measure of damages for failure of a broker to carry out an order of his principal is the difference between the price at which the securities should have been sold or bought, and the price within a reasonable time during which the customer could sell or replace those securities.

Bradley, J.

It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest

intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of the broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the states in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion.

Perhaps more transactions of this kind arise in the state of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that state, although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion by Judge Duer. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the Court of Appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock.

On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

12. Damages for Breach of Warranty.

Leavitt v. Fiberloid Company. 196 Mass. 440.

The Fiberloid Company sold Leavitt fiberloid which Leavitt intended, as the company knew, to use in the manufacture of combs. The fiberloid was of poor stock, did not conform to a

warranty that the company would guarantee the stock to be "all right," and caused a fire when it was used by Leavitt. Leavitt sues for damages occasioned by the fire.

Held, that the plaintiff is entitled to damages proximately resulting from the breach of the warranty.

Rugg, J.

Assuming that an express warranty be found to exist, it is necessary to determine the measure of damages to which the plaintiff is entitled. Upon any breach of contract, whether of warranty or otherwise, the defendant is liable for whatever damages follow as a natural consequence and the proximate result of his conduct, or which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of it. The principle is ancient and familiar. The only difficulty lies in its application. A review of some of the cases, wherein the natural and probable consequences of certain acts have been considered, will illumine the path upon the facts now presented. In *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, there was a warranty by the manufacturer that an iron boiler would bear a pressure of one hundred pounds to the square inch of surface. Upon breach of this warranty the plaintiff was held entitled to recover for compensation paid by the purchaser to its employees injured through an explosion of the boiler occurring by reason of the breach of the warranty. In *Manning v. Fitch*, 138 Mass. 273, upon a breach of an agreement not to foreclose a mortgage upon a farm known by the defendant to be used by the plaintiff for the purpose of producing milk, the plaintiff was permitted to recover the money value of the farm to one engaged in that special business. In *Atkinson v. Newcastle & Gateshead Water Works Co.*, L. R. 6 Ex. 404, the defendant corporation was obliged by its charter to keep water at a certain pressure in its pipes upon which were fire plugs. The plaintiff suffered a loss by fire by reason of a failure of water. It was argued that the damage was too remote, but Kelley, C. B., said, "What kind of damage can be a more proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?"

Goods of this sort, when made in the ordinary way, might be liable to burst into flame under the heat common in their further manufacture, and yet might be merchantable and salable as fiberloid, even though possessing this characteristic. If this be so, there would be no implied warranty against such inflammability, and the plaintiff would have no remedy for ignition under an unqualified purchase in ordinary course of trade. The purpose of an express warranty may have been to secure for the plaintiff additional protection. If the burden is sustained by the plaintiff, both upon the issue that possibility of conflagration caused by the ignition of the fiberloid while being heated by the plaintiff was within the scope

of the warranty, and that his injury was caused by a breach of the warranty and not by other agencies, then a case arises where the usual rule, that damages may be recovered for the difference between the value of the goods delivered and those called for by the contract, is not applicable, but where a more liberal one must prevail. But if the jury find that the danger of ignition of the fiberloid in the process of heating was understood by the parties to be so great as to call for such precaution in regard to the place and manner of heating as would make it unlikely that flames from it should be communicated to the building, and if it was expected and understood that the plaintiff would take these precautions, and he failed to do so, the defendant is not liable for the destruction of the building from this cause. In other words, the defendant would not be liable for the larger measure of damages unless the jury find that the plaintiff's building caught fire from this fiberloid while it was being made into combs in the common and ordinary way. The plaintiff's exception as to the rule of damages laid down by the Superior Court upon the breach of an express warranty must be sustained.

13. Damages for Breach of Warranty.

Brock v. Clark. 60 Vt. 551.

Brock bought baled hay from Clark, which was to be "good hay." It was not "good hay," but Brock resold it to Bruce for more than he had paid for it. He now sues for breach of the warranty.

Held, that a vendee may sue for a breach of warranty, even though he subsequently sells the property for an amount greater than that at which he has purchased it.

Ross, J.

It is established by the report of the referee that the hay purchased of the defendant, and paid for by the plaintiff, was to be good hay. It was baled and its quality could not be ascertained by ordinary examination. It did not answer to the character of good hay. The plaintiff was entitled to the benefit of the contract, whether he made a profit or suffered a loss in its sale. As the hay received, because of its damaged condition, did not fulfill the terms of the contract, the plaintiff was entitled to recover from the defendant such a sum of money as, added to the value of the hay received, would make the whole equal to the value of good hay.

The judgment of the County Court was for this sum and no more. The defendant made no compensation for the deficient quality of the hay by the sale to Bruce. He was not a party nor privy to that sale, nor affected by it beneficially, nor adversely. That sale, except as evidence of the value of the hay received, had no relation to the contract rights existing between the plaintiff and defendant in regard to the hay.

14. Specific Performance.

Adams v. Messinger. 147 Mass. 185.

Messinger, the owner of a patented injector for steam boilers, agreed to patent all improvements on his injectors in Canada for the benefit of Adams, who was interested in the invention. This he refused to do, and Adams brings a bill in equity to compel him to take out letters patent.

Held, that specific performance may be granted in connection with contracts referring to personal property when that property is individual in its character and is not upon the market.

Devens, J.

Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained.

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. An agreement to assign a patent will be specifically enforced. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

That equity, by virtue of its control over the persons before the court, takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record.

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the state, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application.

Chapter IV.

AGENCY.

I.

RELATIONSHIP OF PRINCIPAL AND AGENT.

The law of agency involves the relation between principal and agent and between both and third parties with whom the principal deals through his agent. With the law of principal and agent goes the law of master and servant. An agent is actually or impliedly authorized to establish new legal relations, particularly those of a contractual character, between his principal and third parties, whereas the duty of a servant consists chiefly of the performance of mechanical acts not intended to create such new relationships, save as they arise out of the performance of the prescribed duties. From this, it may be seen that the agent often performs many acts of a servant, and a servant, many acts of an agent.

The relationship of principal and agent may be formed:

1. By an agreement amounting to a contract or by an agreement short of contract.

If the agency is formed by contract, the ordinary elements of a contract are necessary in order that principal and agent may mutually enforce their respective obligations against each other. The agreement, however, may fall short of a contract in that, for example, consideration is lacking. In such event, there is no obligation upon either of the parties to execute the terms of the agreement, but if the agent begins performance of the agency, he will be liable for its improper execution. This idea is summarized by the statement that a gratuitous agent is liable for misfeasance but not for nonfeasance.

An agent may be appointed orally, although it is contemplated that he will exercise his authority in writing. When the contract between the principal and third party must be under seal, however, the authority of the agent must be sealed. To this rule there are the following exceptions:

- (a) The performance of an act by an agent for, and in the presence of the principal, is the act of the principal, and hence the question of form of authority does not arise.
- (b) If the instrument is in fact, although the law does not require that it should be, under seal, as for example, a sealed note, the authority need not be under seal.
- (c) An agent's authority to execute a specialty for a corporation need not be under seal.
- (d) One partner may execute a specialty within the actual or ostensible scope of firm business without authority under seal from the other partners.
- (e) Oral authority is sufficient for the delivery of a deed or for the filling in of blanks in a deed.

2. By ratification.

When one person does an act for another without authority, the person for whom such act is done may afterwards adopt the act as done in his behalf, thereby giving it the same legal effect as if it had been originally authorized. This subsequent assent, the effect of which relates back to the original act and places the principal in the same position as if he had originally authorized the act, is called ratification. When a person finds that an act has been done in his name or on his behalf, he must ratify the act or disaffirm it. Silence does not give consent to a contract made by a stranger on behalf of the principal, but ratification may be implied from any form of conduct inconsistent with disavowal of the contract. The previous dealings of the parties may be such that the principal is bound to disavow in order to avoid liability.

The following incidents of ratification are important:

- (a) The principal must be an existing person capable of being ascertained, and the contract must have been made in his name or on his behalf.
- (b) The principal must, with full knowledge of the facts, expressly or impliedly consent to become a party to the contract. This does not include full knowledge of the legal effect of the act done for him.
- (c) While a contract required by the statute of frauds to be in writing may be orally ratified, in most jurisdictions a contract under seal must be ratified under seal.
- (d) Ratification is analogous to acceptance of the contract, and hence is irrevocable. However, the rights of intervening strangers, such as creditors, cannot be cut off by this means, and by the majority rule, the third person may recede from the contract at any time prior to ratification.

Ratification cannot be made in the following instances :

- (a) If the act was not an act that the principal could lawfully do at the time it was originally done in his behalf.
- (b) If the act required a present existing intention on the part of the principal, such as the giving of a notice specifying the intention of the principal.
- (c) In many jurisdictions, if the act ratified was a crime on the part of the agent at the time it was committed. The best example of this type of case is forgery.

3. By estoppel.

When a person without dissent allows another to act for him in a particular transaction or course of transactions, he is estopped to deny the agency against any one dealing with that other in good faith in reliance on the conduct of the principal. The relationship, as far as third persons are concerned, may arise without any real agency between the principal and agent, by reason of misleading acts or acquiescence of the principal. Estoppel may go to the existence of the agency or to the extent of the agency. In any event, it must be based upon acts of the principal and not of the agent alone.

From the doctrine of estoppel, it follows that one who deals with an agent acting within the apparent scope of his authority but actually beyond his authority, is protected. It follows also that a third person may assume that the agent has the powers reasonably necessary for the execution of powers actually conferred; the powers annexed by custom or usage to the agency in question; and any other powers which the principal reasonably leads the third person to believe that the agent possesses.

4. By necessity.

In some cases the law considers persons to be the agents of other parties by necessity arising from the relationship between them. The most common of these cases are the following :

- (a) In addition to actual authority and ostensible authority, a wife has an agency by necessity to obtain those necessities of life for her support which her husband has neglected or even refused to furnish her. This agency may exist even though the husband has notified third persons not to furnish the wife with supplies. It is always limited to actual necessities.
- (b) An infant, in most jurisdictions, has a like agency by necessity, to bind his father.
- (c) The doctrine is often extended to cover the employment of medical assistance in cases of extreme need, particularly railway accidents or like emergencies.

A. Relation in General.

1. Servants and Agents.

Kingan & Co., Ltd. v. Silver. 13 Ind. App. 80.

Nichols, a traveling salesman in the employ of Kingan & Company, acting on their instructions, procured from W. F. and James Silver a note payable to the order of Kingan & Company in payment for goods sold. The note originally bore interest only after maturity, but it was altered by Nichols in this respect without the knowledge of any of the parties. Kingan & Company seek to enforce the note in accordance with its original terms. The defendants claim that the alteration discharged the instrument.

Held, that a servant has no authority to change contracts of his master; no alteration made by him is binding, as forming contractual obligations for his master is no part of employment.

Lots, J.

The change in the note was not made by the plaintiff's order or direction, but it entrusted certain business to another as its agent and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business and in the scope of his authority, then the act of the agent is the act of the principal. The solution of this case depends upon the relation existing between Nichols and the plaintiff, at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff, and the law is with the defendants. If his position was that of a mere stranger to the note, then the law is with the plaintiff.

This leads to the inquiry: "Who are agents and who servants?" In the primitive conditions of society the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary, the business was generally transacted by the parties thereto in person. But the strong and powerful had many servants who were usually slaves. The servants performed menial and manual services for the master. As civilization advanced, the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons. The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference

between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often denominated servants and servants are often called agents. The word "servant" in its broadest meaning includes an agent. There is, however, in legal contemplation, a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms *mandatum* (to put into one's hand or confide to the discretion of another,) and *negotium* (to transact business or to treat concerning purchases) in describing this relation. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master and clothed with higher powers and broader discretion than a servant.

The terms "agent" and "servant" are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject, shows that there is a difference between them. Agency, in its legal sense, always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another.

The grocer is liable for the negligence of his servant, the driver. But why or upon what principle? It is sometimes said that the reason for the master's liability in such cases is his negligence in employing an unskilful servant. If this were really the true reason, the logical result would be that if the master was guilty of no negligence in employing the servant, he would not be liable. This, however, we know does not follow. It is no defense that the master used the greatest care in employing his servant. Again, suppose an engineer or servant of a railroad company wilfully ran a train of cars over another person; we know the company is liable for the wrongful act of its servant, and that it is no excuse for the company to say it did not authorize the act and that it was done without the knowledge or consent of the company, or against its expressed will or order.

It is difficult to understand this principle of liability unless we approach it from the side of history. It is in reality a survival of the ancient doctrine that the master or owner was liable for the act of his slave and for injuries committed by animals in his possession. The ancient idea was that the family of the master, including his slaves, his animals, and all other property, was a unity; and that the personality of the master affected all of his property; that as he was entitled to all the benefits of ownership he must accept the consequences flowing from injuries caused by his property. He might buy off the vengeance of the injured person or he might appease it by surrendering the injured property to the person ag-

grieved. In Roman law there was a class of actions known as *noxal* actions, which provided for this vicarious liability. The defendant had the option of surrendering the delinquent instead of paying damages. In ancient times the masses were slaves; in modern times the masses are freemen. When slaves became freemen, the master was shorn of his power to surrender the delinquent servant; but he still continues to be liable for the acts of his servant done in the line of employment. This principle of liability originates in slavery and in the power and dominion that the master exercised over the members of his family. But it may be said that, as the master has ceased to have any property in his servants, and as he is shorn of his power to surrender a delinquent, the reason for the rule fails, and that the law must fall with the reason, and that this would result in exonerating the master from all liability in all such cases. It is true that the power of surrendering the delinquent has ceased, but it is not true that the personality of the master has ceased to affect his servants. The will of the master dominates any given enterprise. He calls to his aid, servants and appliances. The servant surrenders his time and in a measure permits the will of the master to dominate and control his actions. He is the instrument of his master in accomplishing certain ends. The servant is placed in the position and given the opportunity to commit the wrong by the will of the master. In a qualified sense the servant is the representative of the master. Without the controlling, dominating influence of the master's will, there is but the remotest probability that the servant would have been placed in the position or given the opportunity to commit the particular wrong. Anciently, the liability of the master was not limited by the duties imposed upon his slave. When a servant became a freeman he was no longer a member of the master's family, and he could not properly be said to be the representative of his master except in the line of the employment. Modern jurisprudence properly and justly limits the liability of the master to the acts of his servant done within the scope of the employment. There is still substantial and just grounds for the principle that the master is liable for the wrongful acts of his servant. No liability arises against the master for the wrongful acts of his servant unless the servant has perpetrated an injury either upon the person or property of another. Nichols was the servant of the plaintiff when he made the alteration of the note. But did he inflict any injury upon the property of the defendant? Certainly not. The injury, if any, was inflicted by the servant upon the property of his own master, and not upon the property of the defendant. If appellee's contention be true, Nichols destroyed the plaintiff's note, and no recovery can be had upon it nor upon the original consideration. The principle that the master is liable for the tortious acts of his servant committed in the line of the employment has no application to the facts of this case, for no injury was done the defendant's property.

Even if it be conceded that Nichols was the agent of the plaintiff when he made the alteration, there is high authority sus-

taining the position that in doing so he exceeded his authority, and that his act would not be binding on his principal. An agent, to transact the business of the principal, is not clothed with authority to destroy the property of the principal or to violate a rule of public policy.

2. Powers of Joint Agents.

First National Bank of North Bennington v. Town of Mount Tabor. 52 Vt. 87.

The Town of Mount Tabor in pursuance of a statute passed to enable towns to obtain railroad communication, issued bonds in 1867, for the payment of which the plaintiff sues. The statute authorized the issue upon the assent of a majority of tax payers evidenced by an instrument of assent certified by a board of three commissioners. Only two of the commissioners of the town signed the instrument; the third refused to do so on account of his belief that a majority of the tax payers had not assented. At the trial, the defendant contends that the signature of all three commissioners was necessary in order to make the bonds a binding obligation.

Held, that a majority of a board of public agents may perform the functions entrusted to the board, although the rule is different as to private agents.

Royce, J.

It seems, at common law, that when an authority is conferred upon several it is sometimes necessary to its lawful exercise that all should act together and all concur in the result, while under other circumstances the decision and act of the majority is good, provided all meet and deliberate, or have notice so to do; and in yet other cases the act of the majority, or the majority of the quorum alone, will be upheld. In the case at bar it is only necessary to deduce from the authorities which of the first two named rules is to be here applied.

"If the authority, in a matter of mere private concern, be confided to more than one agent, it is requisite that all join in the execution of the power; though the cases admit the rule to be different in a matter of public trust; and if all meet in the latter case, the act of the majority will bind."

The rule of law being clearly established, and the distinctions clearly and sharply defined, it only remains to apply them to the commissioners in the case at bar. Were the commissioners provided for by the Act of 1867, and named in the instrument of assent of the

town of Mt. Tabor, private agents, or clothed with a power, trust, or authority for merely private purposes? We think not. They represented no party or interest but the town, which is a public corporation, and the inhabitants thereof.

3. Liability of Joint Principles.

Davison v. Holden. 55 Conn. 103.

This suit is brought by the plaintiffs for the price of groceries sold by them to the Bridgeport Co-operative Association, an unincorporated society of which Holden was president, and Tate, treasurer. The Association conducted a retail meat-market upon co-operative principles, and although it sold to the public generally, its primary purpose was to eliminate middlemen's profits for the members. The plaintiffs seek to hold the defendants as members of the Association who have authorized the purchases.

Held, that those members of an unincorporated association who have authorized the incurring of an indebtedness by agents of the association are liable upon it.

Pardee, J.

The determination of the controversy as to the liability of the defendants depends not at all upon the question whether they and the other associated individuals were partners as between themselves; nor upon the question whether as between all of the associates and strangers they were such; but upon the law of agency. If the defendants clothed an agent with unrestricted authority to buy, they must pay, regardless of the other questions.

Upon the record the defendants, with others undisclosed, associated themselves for commercial purposes, for their pecuniary advantage. For convenience they transacted business under an assumed associate name; sent their managers and agents into the market with unrestricted authority to buy goods and pledge their credit under that name; to buy for the benefit of all jointly and of each individually. In the due execution of the authority conferred upon them, they contracted the debt in suit and pledged the joint and several credit of the associates. As a matter of law, the plaintiffs, in giving credit to the associate name, gave credit to the individuals who upon inquiry should be found to stand behind it.

It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as a matter of law they would be, or that they intended that the goods when bought should become the property of the association. Having given to the agent unrestricted authority to buy, their secret intent as to the ultimate destination of the merchandise is of no

avail. The rule that he who instructs his agent to buy can be made to pay, stands quite independent of intent or knowledge; he who buys by an agent buys by himself, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he buys.

4. Relationship by Agreement.

Central Trust Co. v. Bridges. 57 Fed. 753.

Eager was president and principal stockholder of the Knoxville Southern Railroad Company and also operated a Construction Company which had a contract with the Railroad Company to build part of its road. Suit was brought by a mortgagee of the road to foreclose the mortgage. Numerous contractors who had made construction agreements with Eager intervened, claiming liens on the ground that they had made their contracts with the Railroad Company as principal through Eager as agent.

Held, that the relationship of principal and agent must be formed by an intended assumption of the relationship.

Taft, Cir. J.

The theory upon which the master and the learned court below held that all the intervening petitioners dealt directly with the Knoxville Southern Railroad Company as principal contractors was that Eager was an agent of the railroad company in making the contracts. One may be liable for the acts of another as his agent on one of two grounds: first, because by his conduct or statements he has held the other out as his agent; or, second, because he has actually conferred authority on the other to act as such.

It follows, necessarily, that Eager was not the agent of the company in contracting with the petitioners for the construction of the road, unless the company had in fact conferred authority upon him to act as its agent in the matter. An agent is created—authority is conferred—very much as a contract is made, i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them. Now, did the relation in fact exist? There is not, anywhere in the proof, a single circumstance or a statement that either the company or its directors intended, or that Eager intended, his relation to the company in constructing the road to be anything other than what he always said it was, and what the petitioners understood it to be,—that of principal contractor.

5. Form of Authority: Parol Authority to Sign Written Instrument.

Johnson v. Dodge. 17 Ill. 433.

Iglehart, as agent of Dodge, entered into a written agreement to sell Walters certain land belonging to Dodge. Walters assigned his rights to Johnson, the plaintiff, who sues for specific performance of the contract. Dodge defends on the ground that Iglehart's oral authority was insufficient.

Held, that although the authority must be exercised in writing, an agent may be appointed orally.

Skinner, J.

In this case, the contract, if Iglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds, that the authority to the agent need not be in writing, and by this construction we feel bound. Authority from Dodge to Iglehart to sell the land included the necessary and usual means to make a binding contract in the name of the principal. If the authority to sell may be created by parol, from this authority may be implied the power to use the ordinary and usual means of effecting a valid sale; and to make such sale it was necessary to make a writing evidencing the same. If a party is present at the execution of a contract or deed, to bind him as a party to it, when his signature is affixed by another, it is necessary that the person so signing for him should have direct authority to do the particular thing, and then the signing is deemed his personal act. In such case the party acts without the intervention of an agent and uses the third person only as an instrument to perform the mere act of signing. This is not such a case. The agent was authorized to negotiate and conclude the sale, and for that purpose, authority was implied to do for his principal what would have been incumbent on the principal to do to accomplish the same thing in person.

The mode here adopted was to sign the name of Dodge "by" Iglehart, "his agent," and it is the usual and proper mode in carrying out an authority to contract conferred on an agent. But if the signing the name of the principal was not authorized by the authority to sell, yet the signature of the agent is a sufficient signing under the statute. The language of the statute is, "signed by the party to be charged therewith or some person thereto by him lawfully authorized." If Iglehart had authority to sign Dodge's name, then the contract is to be treated as signed by Dodge; and if Iglehart had authority to sell, in any view, his signature to the contract is a signing by "some other person thereto by him lawfully authorized," within the statute. It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract and payment of money under

it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could.

6. Form of Authority to Give Sealed Instrument.

Long v. Hartzevell, Administrator. 34 N. J. L. 116.

Platt, acting under parol authority for Carpenter, agreed by a contract under seal to sell property to Long. Long sues the defendant, Carpenter's administrator, for damages for the non-performance of this contract. The defense is that Platt had no authority to make a contract under seal in behalf of Carpenter.

Held, that although an agent's authority to execute a contract under seal must ordinarily be under seal, the rule does not apply when the contract is one to which a seal is not necessary.

Van Syckel, J.

The authority to the agent to execute the written agreement having been by parol, it is insisted that it does not bind the principal. Our statute of frauds does not require the agent's authority to make a contract to convey land to be in writing; it exacts a written contract, not a written power to the agent. The distinction is clearly drawn in the terms of the statute, between conveying, and contracts to convey, land. The fact that the contract in this case was sealed by the agent does not vitiate it. There is no doubt about the general rule that a power to execute an instrument under seal must be conferred by an instrument of equal solemnity. If the writing given by the agent be under seal, and that be essential to its validity, the authority of the agent must be of equal dignity, or it cannot operate. Here a seal was not vital to the contract; there was no authority to the agent to attach a seal, therefore the seal is of no value, but the power to execute the contract without seal having been ample, so far it becomes the act of the principal, and inures as a simple contract.

7. Instrument Sealed by Agent in Presence of Principal.

Gardner v. Gardner. 5 Cush. (Mass.) 483.

Polly Gwinn gave a mortgage deed to Burnell, through whom the plaintiff, who now attempts to foreclose, claims. The defense is that Mary Gardner, who signed Polly Gwinn's name to the mortgage, in her presence, and at her request, did not have authority under seal in that regard.

Held, that when an act is performed in the presence of the principal, an agent's authority to sign a sealed instrument need not be sealed.

Shaw, C. J.

The only question is upon the sufficiency of the execution of a

mortgage deed, as a good and valid deed of Polly Gwinn. The execution of the deed is objected to, on the ground that when a deed is executed by an agent or attorney, the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself. To hold otherwise, would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal.

It appears to us that the distinction between writing one's name in his presence and at his request, and executing a deed by attorney, is obvious, well founded, stands on satisfactory reasons, and is well sustained by authorities. We think the deed was well executed by Polly Gwinn; and judgment must therefore stand for the defendant.

8. Authority of Agent to Fill Blanks in Sealed Instrument.

White v. Duggan. 140 Mass. 18.

This was a suit by a judge of the Probate Court against two sureties on a probate bond. The bond had been signed in blank by the two sureties upon representation of the principal that the amount was to be \$2,000. It was in fact made out for a larger sum required by the Probate Court. The sureties contend that the unauthorized completion of the bond relieves them of any obligation upon it.

Held, that oral authority to an agent to fill up blanks in a sealed instrument is sufficient.

Holmes, J.

When the grantee or obligee is ignorant of the order in which the several parts of the instrument are written, and the delivery to him is duly authorized, he is entitled to assume that the instrument was so written as to bind the grantor or obligor from whose control it comes. We should add that, in this Commonwealth at least, we can-

not question for an instant that the authority to deliver merely may be given by parol. To admit a doubt on this point would shake many titles.

If we are to interpret the bill of exceptions more favorably for the defendants than we have done thus far, and to take it that they only authorized the bond to be filled in with a penal sum of \$2,000—and even if we take the further step of assuming that limitation to have carried with it the understanding between them and the principal that they only assented to a delivery if the bond was filled in as they expected it to be—we are still of opinion that no defense is made out. We are aware that there are several cases more or less opposed to our conclusion. But we think that the prevailing tendency, both in this state and elsewhere, has been in the direction we have taken.

These decisions are generally put on the ground of estoppel. It has been debated in England whether, and under what circumstances, there could be an estoppel by negligence. And it has been admitted that there might be, in a supposed case hardly as strong as this. A specialty deriving its validity from an estoppel *in pais* is perhaps somewhat like Nebuchadnezzar's image with a head of gold supported by feet of clay. But if the case is properly put on that ground, then, the difference between intent and negligence, in a legal sense, is ordinarily nothing but the difference in the probability, under the circumstances known to the actor according to common experience, that a certain consequence, or class of consequences, will follow from a certain act, and it follows that the question when an estoppel will arise is simply one of degree. If, on the other hand, the true question is the scope of the principal's authority to deliver the bond—bearing in mind that an authorized delivery will cure defects in the writing of the bond, that the authority may be greater than is wished by the obligor, ostensible authority being actual authority—then the question is one of degree, depending on the particular circumstances, just as the same question is in tort. All that we have to do is to deal with the case before us; and it will serve no useful purpose to consider whether, if the surety had entrusted the bond to the principal, with no authority to deliver it at all, or whether, if he had handed a blank sheet of paper, with his signature and seal at the bottom, to an agent, directing him to deliver it filled out one way, and he had filled it out in an entirely different way and delivered it, such cases would fall on one or the other side of the line. We are of opinion that, when a bond such as this is entrusted to the principal for his use, to fill it up and deliver it, the possibility of his being required by the probate judge to insert a penal sum larger than the surety directed, and of his doing so, is so obvious and so near, that the surety must be held to take the risk of his principal's conduct, and is bound by the instrument as delivered, although delivered in disobedience of orders, if, as here, the obligee had no notice, from the face of the bond or otherwise, of the breach of orders. To hold otherwise would be to disregard the habits of the community.

B. Ratification.

1. Definition.

Keighley v. Durant. (1901) A. C. (Eng.) 240.

Keighley, Maxsted & Company authorized Roberts, a corn merchant, to buy wheat on joint account for himself and them at a certain price. Roberts was unable to make the purchase at that price, but afterwards purchased at a higher price in his own name, intending the transaction to be on joint account. To this, Keighley, Maxsted & Company assented. Durant, with whom the agreement for the purchase of the corn was made by Roberts, sues Keighley, Maxsted & Company for failure to accept delivery of the wheat.

Held, that in order to bind a principal upon a ratification, he must be disclosed at the time of the making of the contract.

Lord Macnaghten:

As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in the English law. That doctrine is thus stated: "That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority." And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? If the statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say, certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed

intentions. That is a very old principle. Lord Blackburn traces it back to the year-books of Edward IV. and to a quaint judgment of Brian, C. J.: "It is common learning," said that Chief Justice, who was a great authority in those days, "that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts." It is, I think, a sound maxim—at least, in its legal aspect: and in my opinion it is not to be put aside or disregarded merely because it may be that, in a case like the present, no injustice might be done to the actual parties to the contract by giving effect to the undisclosed intentions of a would-be agent.

Lord Lindley:

Had Keighley, Maxsted & Company authorized Roberts to buy for them, there would have been a contract in fact, although Durant & Company did not know of them and did not intend to sell to them. This is, no doubt, an anomaly; but there is a reality behind it. To apply the same sort of reasoning to a different state of facts from which the reality is absent is to go further than any existing authority, and to extend a fiction further than is required by those necessities or conveniences of trade which led to its introduction.

2. What Constitutes Ratification.

McCracken v. The City of San Francisco. 16 Cal. 591.

The city of San Francisco passed Ordinance 481 authorizing the sale of certain property belonging to the city. McCracken bought this property, but now seeks to recover the money paid on account, as the ordinance authorizing the sale was invalid, for the reason that it was not passed by a majority vote of the council. The city contends that it has ratified the sale by other ordinances properly passed, dealing with the money received from the sale.

Held, that ratification must be made with intent to ratify.

Field, C. J.

To determine the effect of these acts, as a ratification of the sale, it is necessary to consider the conditions essential to a valid ratification. To ratify, is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. It follows as a consequence, that where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be con-

ferred by ordinance, a ratification of such act can only be by ordinance.

It follows, also, from the general doctrine, that a ratification is equivalent to a previous authority, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which by his ratification he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract, if between its date and the attempted ratification he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone.

If we apply these principles to the case at bar, the question of ratification will be one of easy solution.

There is nothing in the appropriation from which an intention to ratify the sale can be implied; and if the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, since it is manifest that the Common Council were at the time laboring under the mistaken impression that Ordinance 481 had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle, therefore, any proceedings of the Common Council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity.

3. Necessity of Ratification or Disaffirmance.

Heyn v. O'Hagen, 60 Mich. 150.

A shoemaker living in Marquette represented to Heyn that he was in the employ of O'Hagen, and upon that representation, had goods shipped to the former place of business of O'Hagen, which he himself then occupied. Heyn sent an invoice of the goods to O'Hagen, who asked the shoemaker about the circumstances. Upon finding out that the transaction was fraudulent, O'Hagen nevertheless said nothing to Heyn until Heyn called on him for payment. Nothing more was done until some time later, when both Heyn and O'Hagen went to the store of the shoemaker where they made a tentative adjustment which was not carried through. Heyn in this suit contends that O'Hagen has ratified

the acts of the shoemaker by failing to disaffirm upon notification.

Held, that a person must ratify or disaffirm within a reasonable time after notice.

Champlin, J.

The principle is well established, "That if a man either by word or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces them to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

But there can be no estoppel unless the plaintiff was induced to take some action in reliance upon the statement or conduct of the defendant which otherwise he would not have taken, and which operated to his prejudice.

Under the facts found, the question is clear to me that the defendant has ratified the act of the shoemaker in ordering the goods in the name of the defendant. "To ratify is to give sanction and validity to something done without authority by one individual on behalf of another." Ratification may be express or implied. When there is no express ratification, the facts and circumstances from which a ratification may be inferred must be such as are inconsistent with a different intention. Here the ratification, if any exist, must be inferred from the silence of defendant, and his neglect to inform the plaintiff that he had not authorized the shoemaker to purchase goods on his credit, or to order them in his name, after he was fully informed of the facts.

In considering whether the facts and circumstances of a particular case are sufficient evidence of a ratification, the distinction has been made between the unauthorized act of an agent where the relation of principal and agent already exists, and that of a mere volunteer or stranger. In the former case it is said that an intention to ratify will always be presumed from the silence of the principal after being informed of what has been done on his account, while in the latter case it has been said there exists no obligation to repudiate the transaction, nor will silence be construed into a ratification.

Whether silence operates as presumptive proof of ratification of the act of a mere volunteer, must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency.

"The rule as to what amounts to a ratification of an unauthorized act is elementary, and may be stated thus: When a person assumes in good faith to act as agent for another in a given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must, within a reasonable time, disaffirm the act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act."

The qualification of good faith is, it seems to me, unnecessary in the person who assumes, without authority, to act as agent. If the person with whom he deals as agent acts in good faith, and with reasonable care, the act is capable of being ratified by the person on whose behalf such pretended agent assumes to act, whether the agent himself acts *bona fide* or *mala fide*.

In this case the direct results of the silence of defendant, and his neglect to inform plaintiff in a reasonable time after he was fully informed of what had been done, was to lead plaintiff into the belief that the shoemaker was in fact the agent of defendant, and caused the plaintiff to sell to defendant, as he supposed, another invoice of goods, which he sent to defendant by express, and [he] also mailed to him the invoice of the second bill, which defendant received. Here, by his silence, [the defendant] permitted this shoemaker, whose name neither the plaintiff nor defendant knows, to defraud the plaintiff by pretending to act for and on his behalf. Under these circumstances, defendant, by his silence and tacit acquiescence in the conduct of the shoemaker, must be held to have ratified the agency.

4. Consideration for Ratification Unnecessary.

Grant v. Beard. 50 N. H. 129.

The defendants' father brought wagons belonging to them to Grant to be repaired. Grant seeks the amount of his bill for the repairs, claiming that the defendants ratified the contract made on their behalf by their father. The court instructed the jury to the effect that the defendants must receive some benefit from the repairs.

Held, that upon ratification, a contract becomes effective without regard to the benefit secured under it.

Foster, J.

The ratification, upon full knowledge of all the circumstances of the case, of an act done by one who assumes to be an agent, is equivalent to a prior authority. By such ratification the party will be bound as fully, to all intents and purposes, as if he had originally given express authority or direction concerning the act.

A parol contract may be ratified by an express parol recognition of the act, or by conduct implying acquiescence, or by silence when the party, in good faith, ought to speak. And so the principal may be estopped to deny the agent's original authority.

Such ratification relates back to and incorporates the original contract or transaction, so that, as between the parties, their rights and interests are to be considered as arising at the time of the original act, and not merely from the date of the ratification; and a suit to enforce the obligation assumed by the party who ratifies, is, to all intents and purposes, a suit founded upon the original act or contract, and not on the act of ratification.

Therefore the original consideration applies to the ratification, thus made equivalent to an original contract, and supports the implied promise upon which the present action is founded.

The ratification operates *directly*, and not merely as presumptive evidence that the act was originally done by the authority of the defendants; and therefore it is unnecessary to consider whether or not the evidence tends to show an original authority. The subsequent assent is, *per se*, a confirmation of the agent's act; and there is no valid distinction between a ratification of the agent's act, and a direct and original promise to pay for the services rendered by the plaintiff. Wherever there would have been a consideration for the original engagement if no agent or party assuming to act as agent had intervened, such original consideration is sufficient to sustain the act of ratification.

In none of the cases cited is the subject of a new consideration to support the ratification alluded to as necessary; but the logical deduction from the principle that the ratification relates back to and covers the original agreement is wholly inconsistent with such a proposition; and the contrary doctrine is expressly held in numerous cases.

5. Form of Ratification.

MacLean v. Dunn. 4 Bing. (Eng.) 722.

MacLean sold Russian wool to Dunn's firm, the defendants, receiving in exchange as part of the purchase price, an amount of Spanish wool. This transaction was effected by Ebsworth, a broker, who gave "bought and sold" notes for both parties without authority from the defendants, but later they orally ratified the transaction. In a suit for breach of the contract brought by MacLean, the defense is set up that ratification of this contract, originally within the statute of frauds because of the amount of the purchase price involved, should have been made by a written instrument.

Held, that a contract required by the statute of frauds to be in writing may be ratified orally.

Best, C. J.

It has been argued that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or his agent thereunto lawfully authorized; leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time, and in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. But where a broker, who signed a broker's note upon a sale of corn, was the seller's agent, Lord Ellenborough held that if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the statute of frauds: and where A. and B., being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the statute of frauds. That is an express decision on the point, that under the statute of frauds the ratification of the principal relates back to the time when the agent made the contract.

6. Form of Ratification of Sealed Contract.

McIntyre v. Park, 11 Gray (Mass.) 102.

McIntyre sues for nonperformance of an indenture wherein he agreed to convey his store and stock in trade to Park, Castle and Young, who agreed to pay a specified price therefor. Castle prepared the indenture and signed the name of Park, the defendant, in his absence. Subsequently Park consented to be bound by the writing and both sides treated it as a valid contract.

Held, that a sealed instrument may be orally ratified in Massachusetts.

Metcalf, J.

The evidence of the defendant's ratification or adoption of the agreement executed in his name was rightly admitted; and he, by

such ratification or adoption, became answerable for a breach of that agreement. The agreement was under seal; and the defendant contends that a sealed instrument, executed without previous authority, can be ratified only by an instrument under seal. By the law of Massachusetts such instrument may be ratified by parol. The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases.

7. Necessity of Existence of Principal at Time of Act Ratified.

McArthur v. Times Printing Company. 48 Minn. 319.

Before the Times Printing Company was incorporated, the promoters made an agreement with McArthur on its behalf, whereby McArthur contracted to work for the company and solicit advertisements for it for a year, in consideration of a certain weekly salary and five shares of the stock of the company. After McArthur had been employed for some time, he was discharged, and he now brings suit against the corporation for breach of contract. The defense is, in part, based upon want of authority by the promoters to contract for the company.

Held, that although a principal not yet in existence cannot ratify a contract made on his behalf, he may adopt the transaction as his own.

Mitchell, J.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be expressed, but it may be inferred from acts or acquies-

cence on part of the corporation or its authorized agents, as any similar original contract, might be shown. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof." This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company.

Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds.

8. Knowledge of Facts Necessary to Ratification.

Kelly v. Newburyport Horse Railroad Co. 141 Mass. 496.

The railroad gave to two of its directors certain notes, originally voidable, which were afterwards indorsed to the plaintiff, who holds as an assignee. In a suit on these notes, the plaintiff insists that the corporation ratified them and that they are consequently binding obligations. The defendant contends that its recognition of the notes as valid obligations was without knowledge that the notes were originally voidable.

Held, that while ratification must be made with knowledge of facts, it is not essential to ratification that the party ratifying know the law concerning the original obligation.

Allen, J.

The request sought to incorporate into the doctrine of ratification a new element, namely, that, in order to make a valid ratification, the principal must have known not only all the facts but also the legal effect of the facts, and then, with a knowledge both of the law and facts, have ratified the contracts by some independent and substantive act. This request was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid down, when one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have.

9. Ratification of Entire Contract Necessary.

Shoninger v. Peabody. 57 Conn. 42.

Day, the general agent of the plaintiffs, sold a piano to Peabody, a stockbroker, for \$300, agreeing that the price should be paid out of commissions to be earned by Peabody in trading for the benefit of Day. Day afterwards absconded, and the plaintiffs sue for the price.

Held, that the plaintiffs cannot ratify part of the contract without ratifying the whole.

Loomis, J.

The manifest wrong and injustice perpetrated upon the plaintiffs by the defendant and Day, make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. But the greatest good to the greatest number requires adherence to sound general principles, even though in a given case a party may fail in obtaining redress. The whole trouble in this case arises from a mistake as to the plaintiff's remedy.

When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin, or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant; and in contemplation of law a subsequent ratification and adoption of an act has relation back to the time of the act and is tantamount to a prior command.

The argument for the plaintiffs (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part, that is, that the contract is to be treated as good for the agreed price, but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety.

There was no contract at all relative to the piano except the one made by Day as their agent, and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular both as to price and as to the terms of paying the price.

10. Intervening Rights of Third Parties.

Pollock v. Cohen. 32 Oh. St. 514.

Pollock, to whom Bornstien owed money, sent Schloss to collect it. Schloss, in order to obtain satisfaction of the debt, but in excess of authority, bought out Bornstien's business for Pollock, agreeing to pay a certain sum over the indebtedness. Pollock ratified the transaction. In the meantime, Cohen attached the business on a debt due him. Pollock brings this action to recover the goods so attached.

Held, that ratification cannot be made in such a way as to cut off the intervening rights of third parties.

Ashburn, J.

The rule is, where an agent, in the transaction of the business, has exceeded his authority, and his principal, with a full knowledge of the circumstances, deliberately ratifies the unauthorized acts of his agent, the ratification reaches back to the inception of the unauthorized acts, and the principal is bound thereby.

There are exceptions to this rule. If an innocent third person acquires rights, in good faith, in the property, after the commission of the unauthorized act, and before it has been sanctioned by the principal, the ratification will not operate retrospectively so as to defeat such intervening rights. "Innocent strangers, with intervening vested rights, are not so precluded. These rights, so far as they accrued prior to his ratification, the principal can not touch; so far as they are concerned, the ratification is utterly without effect."

In this case, by the testimony, Schloss made the alleged purchase about the 27th of May, 1867. Cohen caused his attachment to be levied upon the goods about the 24th of June, 1867, and the attempted ratification did not take place earlier than July 5th, 1867. So far as we can learn from the testimony, Cohen was creditor of Bornstien prior to the alleged purchase. By the levy of his attachment on the goods, before the ratification of the agent's unauthorized purchase, he acquired a valid claim to and lien upon the attached goods, which Pollock's ratification could in no way divest.

11. Right of Third Party to Withdraw before Ratification.

Kline Bros. & Co. v. Royal Insurance Co., Ltd. 192 Fed. 378.

When the corporation of Kline Brothers and Company was about to be formed, McIntosh, on behalf of the projected corporation, insured with the defendant company property which it was expected the new corporation would acquire. The directors of the new corporation did not learn of the existence of the policy until after the property had been destroyed by fire, whereupon they purported to ratify the contract. The Insurance Company defends on the ground that until ratification there was no contract.

Held, that there is no contract before ratification, and that until that time, the third party may withdraw.

Hand, Dis. J.

There seems to be no escape from the conclusion that by his contract with the defendants McIntosh did not bind the corporation to pay the premium. Furthermore, the board of directors never learned of the policies until after the fire, and did not therefore ratify them up to that time. At least, there is no evidence upon that question and the burden rests with the plaintiff. As I view it, no subsequent ratification was possible. After the fire, McIntosh tendered the premium, and after that the defendants repudiated any liability.

The facts, therefore, raise two questions: First, whether a third party who has made a contract with an unauthorized agent on behalf of his principal is bound before the principal has ratified; and second, if not, whether the occurrence of a fire before the unauthorized application for the policy has been ratified prevents its future ratification so as to bind the company. Upon the first question, there is no doubt some division of authority. In England the law now is that the third party may not withdraw, provided the principal ratifies the contract in season. On the other hand, in Wisconsin and apparently in Illinois, the whole unauthorized contract seems to amount only to an offer by the third person, which must be accepted *de novo* by the principal, a rule certainly at variance with the well-established law that an uncommunicated ratification by the principal will bind him. The English case proceeds on the civil law maxim, "*Omnis rati habitio retrahitur*," though it by no means follows, because a ratification relates back when once a valid contract is made, that the third party is bound meanwhile, and may not withdraw while the principal remains unbound. Now, relation back is, in the sense here used, a fiction, and certainly should not be extended to cover unjust cases, of which this is one, as I shall show. In so far as by the maxim it is only meant to say that a ratification carries with it by implication the intention of the principal that the contract shall in fact date from the time when it was made between the agent and the third party,

it is unobjectionable in principle, and accords with the facts; but, if taken in the sense that the law will regard both parties as bound from the date of the contract, it merely misstates the facts, because, by hypothesis, the principal is not bound before ratification. All that the law can do is to hold the third party bound from the outset, and that by the mere force of authority. It certainly serves no useful purpose to cloak that authority in a phrase which misstates the truth in Latin, unless it accords with the principles of the law of contracts, or at least produces just results at the expense of those principles.

Upon principle the doctrine does not appear to be correct, and it has been criticised by text-writers. The contract of insurance is bilateral, and, until the principal ratifies, he is by hypothesis under no obligation to pay the premium. If so, there is until then no consideration to support the counter promise of the third person, for a consideration implies a legal obligation, and his promise ought not in principle to bind him, being indeed *nudum pactum*. Second: The result is unfair to the third party, since it permits the principal to speculate on the value of the contract, while he himself remains unbound. If it proves advantageous, he may ratify. If not, he may repudiate. There is no just ground for giving him such an advantage over the third party merely because of an unknown defect in the agent's powers.

In the case at bar McIntosh certainly did not intend to bind himself, and he had no authority to bind the company. Therefore, the insurer got no valid promise at all. Nor should this case be confused with those in which a ratification is used against the principal when he is sued.

Here the insurer likewise knew that the loss had occurred, and nevertheless did not withdraw from the contract. If, however, it be once admitted that it was not binding upon them until ratified, it could not be ratified or accepted by paying a premium after the risk had ceased and the fundamental condition of the promise no longer existed. This would be quite obvious had the offer never been accepted at all, before the loss, but, if the policy was not binding while unratified, the situation was the same as though the offer had never been accepted.

12. Ratification of Criminal Act.

Henry v. Heeb. 114 Ind. 275.

Heeb sues Henry as surety upon a note made by a partnership. Henry denies that the signature on the note is his. The evidence is to the effect that he has in any event ratified the signature.

Held, that under the general rule, a forged signature to a note may not be ratified.

Mitchell, C. J.

The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act, so as to become bound, unless facts have intervened which create an estoppel and preclude him from setting up as a defense that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus, the Supreme Judicial Court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory note, who yet, with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally.

There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely.

It is a well established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority, and this is so whether the act be detrimental to the principal or to his advantage, or whether it be founded in tort or contract. The reason is, that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority. So, if a contract be voidable on account of fraud practiced on one party, or if for any reason it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had.

The ratification or adoption of a forged instrument, or of a contract which is prohibited by law or made in violation of a criminal statute, involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promissory

note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretence of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution; "for why should a man pay money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party?"

The distinction made in many well considered cases seems to be this: where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it.

In case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel or without a new consideration for the promise.

C. Agency by Estoppel.

1. The Idea of Estoppel.

Bronson's Executor v. Chappell. 12 Wall. (U. S.) 681.

Bostwick, as agent of Bronson, sold property in Wisconsin to E. and J. Chappell. The contract stated that Bostwick was authorized to receive the first payment upon the contract. Bostwick usually made collections for Bronson, and acted as his general agent in managing his real estate in the vicinity. The second payment on the property sold to the Chappells was paid by them to Bostwick, who thereafter failed. Bronson sues the Chappells, claiming that they should not have made payment to Bostwick.

Held, that the conduct of the principal may estop him from setting up a defense as to the nature of the agent's authority.

Swayne, J.

Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their

recognition, or acquiescence, by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same.

Viewed in the light of the law, we think the evidence abundantly establishes two propositions:

1. That Bostwick was the agent of Bronson, and as such authorized to receive the payments in question.

2. If this were not so, that the conduct of Bronson—numerous transactions between him and Bostwick and the course of business by the latter—authorized or known to and acquiesced in by the former, justified the belief by the defendants that Bostwick had such authority and that Bronson was bound accordingly.

2. To What Acts of the Agent Estoppel Extends.

Bank of Batavia v. The New York, Lake Erie and Western Railroad Co. 106 N. Y. 195.

Weiss, the local freight agent of the defendant at Batavia, made two bills of lading to a consignee in New York in pursuance of a fraudulent scheme evolved by himself and Williams, whereby Williams borrowed money from the bank on bills of lading given by Weiss to him, when no goods had in fact been received for transmission. The bank sues the railroad upon the theory that it is responsible for the acts of its agent.

Held, that a principal is estopped to deny the power of its agent to perform acts which are apparently within the scope of his authority.

Finch, J.

It is a settled doctrine of the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation and the principal is estopped from denying its truth to his prejudice. A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiffs and we approve of that conclusion.

It is obvious upon the case as presented that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

3. Estoppel to Assert Secret Limitations.

Bentley v. Doggett. 51 Wis. 224.

Otis obtained credit for carriage hire with Bentley in the name of the defendants, who employed him as a traveling salesman and who had advanced to him enough money to pay the cost of carriage hire. Otis had no express authority from the defendants to incur any liability on the credit of the firm. Bentley seeks to recover the amount of the bill, contending that the defendants are estopped to deny the authority of the salesman.

Held, that a principal is estopped to assert limitations upon the ostensible authority of his agent.

Taylor, J.

There can be no question that, from the nature of the business required to be done by their agent, the defendants held out to those who might have occasion to deal with him, that he had the right to contract for the use of teams and carriages necessary and convenient for doing such business, in the name of his principals, if he saw fit, in the way such service is usually contracted for; and we may, perhaps, take judicial notice that such service is usually contracted for, payment to be made after the service is performed. It would seem to follow that, as the agent had the power to bind his principals by a contract for such service, to be paid for in the usual way, if he neglects or refuses to pay for the same after the service is performed, the principals must pay. The fault of the agent in not paying out of the money of his principals in his hands cannot deprive the party furnishing the service of the right to enforce the contract against them, he being ignorant of the restricted authority of the agent. If the party furnishing the service knew that the agent had been furnished by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principals for such service, he would be in a different position. Under such circumstances, if he furnished the service to the agent, he would be held to have furnished it upon the sole credit of the agent, and he would be compelled to look to the agent alone for his pay. We think the rule above stated as governing the case is fully sustained by the fundamental principles of law which govern and limit the powers of agents to bind their principals when dealing with third persons. Judge Story, in his work on Agency, says: "The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given more limited private instructions unknown to the persons dealing with him." Later he says: "So far as an agent, whether he is a general or special agent, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for and bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have deviated from his secret instructions." And again, in speaking of the power of an agent acting under a written authority, he says: "In each case the agent is apparently clothed with full authority to use all such usual and appropriate means, unless upon the face of the instrument a more restrictive authority is given, or must be inferred to exist. In each case, therefore, as to third persons innocently dealing with his agent, the principal ought equally to be bound by acts of the agent executing such authority by any of those means, although he may have given to the agent separate private and secret instructions of a more limited nature, or the agent may be secretly acting in violation of his duty."

In this view of the case it was immaterial what the orders of the principal were to the agent, or that he furnished him money to pay these charges, so long as the person furnishing the service was in ignorance of such facts. In order to relieve himself from liability, the principal was bound to show that the plaintiff had knowledge of the restrictions placed upon his agent, or that the custom to limit the powers of agents of this kind was so universal that the plaintiff must be presumed to have knowledge of such custom.

4. Necessity of Misleading Third Person in Order to Create Estoppel.

Crane v. Gruenewald. 120 N. Y. 274.

Mrs. Crane, acting through her attorney, Baker, lent the defendant \$8,000 upon a bond secured by mortgage. The defendant paid \$3,000 on account of the debt to Baker while he had the bond and mortgage in his possession, and afterwards paid the remainder to him, when he had transferred them by a forged assignment to a third party. Mrs. Crane sues to foreclose the mortgage.

Held, that while the attorney had possession of the bond and mortgage, he had ostensible authority to receive payments upon them, but thereafter his ostensible authority ceased.

Parker, J.

A mortgagor who makes a payment to one, other than the mortgagee, does so at his peril. If the payment be denied, upon him rests the burden of proving that it was paid to one clothed with authority to receive it. There is, however, one exception to this general rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been given for its receipt.

So, if a mortgagee permits an attorney, who negotiates a loan, to retain in his possession the bond and mortgage, after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had. This rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; and the second, knowledge of such possession on the part of the mortgagor. The mortgagor must have knowledge of the fact. It would not avail him to prove that subsequent to a payment he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact, the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of

authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney that estops the owner from denying the existence of authority in the attorney which such possession indicates.

Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. This knowledge he did not have, for it was not the fact. By his own wrongful act, the attorney had parted with possession, and as a necessary consequence has deprived himself of the power to longer misrepresent his authority in respect thereto to the detriment of the mortgagee. The mortgagor thereafter placed his trust solely in the assertions of the attorney and was deceived. In so doing he was legally as much at fault as the mortgagee, who also relied upon the attorney's trustworthiness. Therefore, he cannot invoke in support of his contention the doctrine of apparent authority, a rule which undoubtedly had its foundation in the equitable principle that if one of two innocent persons must suffer, he ought to suffer in preference whose conduct has misled the confidence of the other into an unwary act.

5. Right of Third Party to Rely on Apparent Authority.

Heath v. Stoddard. 91 Me. 499.

Heath gave Spencer possession of a piano and instructed him to leave it with Stoddard in anticipation of a sale to Stoddard. Spencer had in fact no authority to make any contract for the sale of the piano, but he assumed authority to sell it to Stoddard and appropriated the proceeds. Heath sues to recover possession of the piano.

Held, that a person who has clothed an agent with apparent authority is estopped to deny that authority.

Wiswell, J.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing.

Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, What

did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal.

For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was entrusted, with an apparent authority which would protect an innocent purchaser?

Let us apply this principle to the present case. Spencer was a dealer in pianos. Immediately before this transaction he had been trying to sell a piano to the defendant. There was evidence tending to show that the plaintiff knew these facts. With this knowledge he entrusted the possession of this piano with Spencer for the purpose of its being taken by Spencer to the defendant's house with a view to its sale. Spencer was not acting merely as a bailee; he did not personally take the piano to the defendant's house, but had it done by a truckman or expressman; Spencer was employed for some other purpose. Whatever may have been the private arrangement between the plaintiff and Spencer, or the limit of authority given by the plaintiff, would not a jury have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of all these facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority to the injury of the defendant? We think that a jury might have properly come to such a conclusion.

6. Principles of Estoppel Equally Applicable to General and Special Agents.

Hatch v. Taylor. 10 N. H. 538.

Hatch gave Clark authority to sell or exchange two horses for him, and instructed him not to sell one without the other. Clark exchanged one of the horses for a mare and colt belonging to the defendant. Hatch refused to recognize the transaction, and now seeks to recover the value of the horse.

Held, that the ostensible authority of a special agent is in most respects the same as that of a general agent.

Parker, C. J.

Where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid and bind his employer.

In the case of general agents, the principal will be bound by

the acts of his agent, within the scope of the general authority conferred upon him, although he violates by these acts his private instructions and directions. He is acting within the scope of his authority, or apparent authority. So a special agent, who has private instructions for his government, but which are not to be communicated to those dealing with him, is acting within the scope of his authority, or apparent authority, when he is acting within the scope of what he is to communicate, and what only the party dealing with him is authorized to know, or is to know if he inquires.

In fact, there seems to be, in such case, a holding out of the agent, or an authorization to him to hold himself out, as having an authority beyond the private instructions intended to limit his action upon the subject matter; and upon that principle the employer should be bound. The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess; although he may have given him more limited private instructions unknown to the persons dealing with him.

D. Agency by Necessity.

1. What Constitutes Agency by Necessity.

The Terre Haute & Indianapolis Railroad Company v. McMurray. 98 Ind. 358.

The plaintiff, a physician, was called by a conductor of the defendant railroad to attend Coon, a brakeman in the employ of the defendant, whose foot had been crushed and who required immediate surgical attention. To a suit for payment for the services rendered by the doctor, the defense is that the conductor had no authority to incur such a liability on behalf of the railroad.

Held, that an act not ordinarily within the authority of the agent may, nevertheless, in case of necessity be binding on the principal.

Elliott, J.

The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent may dwindle into insignificance; while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor is the only agent present, and the emergency is urgent, he must act for the corporation, and if he acts

at all, his acts are of just as much force as that of the highest officer of the corporation. In this instance the conductor was the highest officer on the ground; he was the sole representative of the corporation; he it was upon whom devolved the duty of representing the corporation in matters connected within the general line of his duty in the sudden emergency which arose out of the injury to the fellow-servant immediately under his control; either he, as the superior agent of the company, must, in such cases, be its representative, or it has none. There are cases where the conductor is the only representative of the corporation that in the emergency it can possibly have. There are cases, where the train is distant from the supervision of superior officers, where the conductor must act and act for the company, and where, for the time, and under the exigencies of the occasion, he is its sole representative, and if he be its only representative, he must, for the time and the exigency, be its highest representative. Simple examples will prove this to be true. Suppose, for illustration, that a train is brought to a halt by the breaking of a bolt, and that near by is a mechanic who can repair the broken bolt, and enable the train to proceed on its way; may not the conductor employ the mechanic? Again, suppose a bridge is discovered to be unsafe, and that there are timbers at a neighboring mill which will make it safe; may not the conductor, in behalf of his principal, employ men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled, and that it is necessary to at once move the train to avoid danger, and there is near by a competent engineer; may not the conductor employ him to take the train out of danger? In these examples we mean to include, as a silent factor, the fact that there is an emergency, allowing no time for communicating with superior officers, and requiring immediate action. If it be true that there are cases of pressing emergency where the conductor is on the special occasion the highest representative of the company, then it must be true that he may do, in the emergency, what the chief officer, if present, might do. If the conductor is the only agent who can represent the company, then it is inconceivable that he should, for the purposes of the emergency and during its existence, be other than the highest officer. The position arises with the emergency, and ends with it. The authority incident to the position is such, and such only, as the emergency imperatively creates.

Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate demands of the occasion, we inquire what is such an emergency as will clothe him with this authority and put him in the position designated. Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm; would it not be competent for the conductor to hire a derrick or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer?

Surely someone owes a duty to a man, imperilled as an engineer would be in the case supposed, to release him from peril, and is there any one upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance, and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers? An employer does not stand to his servants as a stranger; he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such a duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a point where there is no station and when no officer superior to the conductor is present; would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former.

2. What is Necessity.

Gwilliam v. Twist. (1895) 2 Q. B. (Eng.) 84.

Gwilliam sues Twist and others, the proprietors of an omnibus, for injuries occasioned by negligent driving. Harrison, the driver of the omnibus, was ordered to stop driving by the police when a quarter of a mile from the defendants' place of business on the ground that he was too intoxicated to continue as driver. He then authorized a man named Veares, a former driver, to drive the omnibus back to the yard. It was during the course of Veares' driving that the plaintiff was injured. The defendants deny the authority of Harrison to employ Veares.

Held, that there was no agency by necessity, and the defendants are not liable for the negligence of Veares.

Smith, L. J.

Ordinarily a master is not responsible for injuries arising from an act of a servant when done not within the scope of his employment. The question is whether under the circumstances of this case it was

within the scope of Harrison's employment to put up Veares to drive the omnibus as he did. If it was not, his employers are not liable. It is clear that it is not *prima facie* within the scope of a coachman's employment to delegate the duty of driving to other persons. But it was argued that circumstances might exist which would constitute the coachman an agent of necessity on behalf of his master to employ some one else to drive, and that under such circumstances he would have authority to do so. To constitute a person an agent of necessity he must be unable to communicate with his employer; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity. In relation to the sale of cargo by the master of a ship as being an agent of necessity, [it was said:] "If there is a fair expectation of obtaining directions, either from the owners of the goods or from agents known by the master to have authority to deal with the goods, within such time as would not be imprudent, the master must make every reasonable endeavor to get those directions, and his authority to sell does not arise until he has failed to get them." The county court judge in stating his findings of fact did not specifically find that there was a necessity for the delegation of the duty of driving the omnibus to Veares. It is true that in subsequently giving judgment he says that it was necessary that some one should drive the omnibus home, but he does not seem to me to have applied his mind to the question as to what constitutes an agent of necessity. The mere fact that somebody must drive the omnibus home, which is obvious, does not constitute the driver an agent of necessity, to employ Veares to do so; and I think that on the facts proved there is no evidence that he was such an agent. When the driver was ordered to desist from driving by the policeman, the omnibus was only a quarter of a mile from the defendants' yard, and there was an obvious possibility of communicating with the employers and by a reasonable endeavour obtaining their directions as to what was to be done. It seems to me, therefore, that there was no evidence to show that Harrison was an agent of necessity so as to justify the putting up Veares to drive the omnibus, and therefore, it not being within the scope of his employment to do so, the defendants are not responsible for Veares' negligence.

3. Agency by Necessity of Wife.

Bergh v. Warner. 47 Minn. 250.

Mrs. Bergh bought a pair of diamond ear-rings from Warner, who sues her husband for the price. Bergh had refused to authorize the purchase, and denies her authority to pledge his credit.

Held, that except in case of necessity, a husband is not responsible for debts incurred by his wife without actual or ostensible authority.

Mitchell, J.

The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds: First, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessities suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show, first, that the husband refused or neglected to provide a suitable support for his wife; and, second, that the articles furnished were necessities. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessities, the general rule adopted is that laid down by Chief Justice Shaw, that it is a question of fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessities.

In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessities; yet, so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to

purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express, or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority.

II.

OPERATION OF AGENCY.

There are certain reciprocal rights and duties between principal and agent. The principal owes the agent the duty of dealing fairly with him, of compensating him for his services, of repaying advances or losses incurred by the agent in the prosecution of the principal's business, and in the case of agents whose employment

is primarily that of servant, of supplying a reasonably safe place in which to work, and ordinarily careful fellow servants.

The agent owes the principal the duty of obeying his instructions, of exercising the skill and judgment which he has agreed to use or which he has held himself out as having, of acting in good faith, which implies that he will not take a position antagonistic to his principal, of accounting for proceeds, and of acting in person unless otherwise authorized.

To third persons, the principal is liable upon all contracts made by the agent within the scope of his actual or ostensible authority. Ostensible authority is the authority created by estoppel, and is consequently not available as a ground of liability to a person who has notice of the limits of the actual authority.

Actual authority includes powers expressly conferred, those reasonably incidental to powers conferred, and those annexed by custom, which must be reasonable, not contrary to positive law, well established, and publicly known.

Ostensible authority includes all those powers which the third party reasonably believes the agent to possess on account of the holding out by the principal that the agent is clothed with them. These powers differ with the nature of the agency as well as with the particular acts of the principal which justify the third party in the belief that the power exists. They usually depend upon the particular facts of each case and are therefore matters for the jury. In the ordinary commercial transactions, however, the limitations of ostensible authority have at the present time become fairly accurately defined.

A public body is not liable for acts of public servants done under ostensible authority, as the law does not allow this form of estoppel to operate against the public. The reason for the rule is often stated to be that it is better for an individual to suffer occasionally than for the public to suffer through collusion with a dishonest agent.

The principal is liable for the torts of his agent committed within the scope of his authority and in the execution of his employment. Within like limits, the master is liable for the torts of his servant. By the better rule, it makes no difference whether it was for the benefit of the agent or servant alone that the tort was committed.

An agent who has contracted on behalf of a principal is not personally liable if he was duly authorized. If authority was lacking, however, he may be held liable to third persons who had no knowledge of the limits of his powers, upon the theory that he warrants his authority by making the contract with them. In the case of torts, the agent may always be personally held if the third party so elects.

A. Mutual Rights and Duties of Principal and Agent.

1. Duty of Principal to Compensate and Indemnify Agent.

Bibb v. Allen. 149 U. S. 481.

Allen & Company sue Bibb & Company for commissions and expenses arising out of the sale of cotton for future delivery on the New York Cotton Exchange. The defense is made that certain contracts were within the statute of frauds and that Allen & Company should have refused to execute them after discovering that a loss would be incurred.

Held, that an agent has a right to be reimbursed for all advances and to be paid for his services.

Jackson, J.

If the statute of frauds was not complied with, in making the sale contracts in the present case, we do not see that the defendant [Bibb] was in a position to take advantage thereof, or that such want of compliance with the statute, after the contracts were executed, would constitute any defense to the action. The suit was not brought on these contracts of sale, which the plaintiff in error claims were voidable under the New York statute of frauds. It is an action by the agents against their principal to recover for work and labor performed, and money paid out at the principal's instance and request, and in the settlement of the principal's business, in which the agent had authority to make disbursements for him. In the present case the plaintiffs had, by their contract, rendered themselves personally responsible for the losses which might, and did, occur under the contracts of sale made for account of the defendant, and as such agents they are entitled to recover against their principal the full amount expended by them for him in the transactions. If in closing out the contracts of sale, profits had been realized on the transactions, whether by reason of decline in the price of cotton, or by the purchases "to cover" the cotton sold, the brokers would, upon well settled principles, have been liable to their principal for the same. They could not have set up or interposed as a valid defense to such liability that the contracts of sale out of which the profits were realized were not enforceable under the statute of frauds, or were voidable by the agents or the purchaser with whom they contracted. Neither can the principal interpose such an objection as against the agent's right to commission or to reimbursement for his outlays, after the execution of contracts, merely voidable for want of writing. It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions

or transactions are not illegal. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him, not only for expenses incurred, but also for damages which he may be compelled to pay to third parties. The exception to this rule is where the transaction for which the agent is employed is illegal, or contrary to good morals and public policy.

A request to undertake an agency or employment, the proper execution of which does or may involve expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to make such expenditure, but also as a promise to repay it.

2. Rights of Servant Wrongfully Discharged.

Howard v. Daly. 61 N. Y. 362.

Daly made a contract with the defendant, who agreed to pay her a certain sum for her services as an actress for a season to commence September 15. Before the season opened, he refused to accept her services. She sues for breach of the agreement.

Held, that a servant who has not yet commenced his service is entitled to sue for damages for breach of the contract of employment, not for wages to be earned under the contract.

Dwight, C.

If a servant has actually performed the service which he has agreed to render under the contract, he has a right to recover wages. That would have been true in the case at bar if the defendant had received her services for the stipulated period. Had he not paid her according to the agreement, her action would have been for the fixed wages. If, on the other hand, she is wrongfully discharged, and the relation of master and servant is broken off as far as he is concerned, it is clear that she cannot recover for wages in the same sense as if she had actually rendered the service.

If a servant be wrongfully discharged, he has no action for wages, except for past services rendered, and for sums of money that have become due. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon. A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach.

(2) He may rescind the contract; in which case he could sue on a *quantum meruit*, for services actually rendered. These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed, either in full or in a specified part, the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge.

To apply these principles to the case at bar, the plaintiff must have been ready and willing to continue in the defendant's service at the time of the latter's refusal to receive her into his employment. It is not necessary, however, that she should go through the barren form of offering to render the service. Her readiness, like any other fact, may be shown by all the circumstances of the case. It sufficiently appeared by the conduct of the parties.

The whole discussion may now be summed up. If the defendant in the case at bar repudiated his contract with the plaintiff after the time of performance had arrived, the plaintiff had an action for damages. Her interview with the defendant sufficiently showed her readiness to perform. Her action was for damages for not being permitted to work, and not for wages; and the defendant might show affirmatively, and by way of mitigation of damages, that she had opportunities to make a theatrical engagement elsewhere, which she did not accept. Without such proof she was entitled to recover the full amount of the compensation stipulated in the contract.

On the other hand, if the defendant rejected the services of the plaintiff before the time for performance arrived, she had an election either to consider his act as a breach of an implied contract with her to take her into his service, and bring an immediate action; or to wait till the appointed day arrived, and then be in readiness to render her services. Her election will be evidenced by her acts. Having made no tender of her services at the appointed day, the presumption is that she considered the act of repudiation by the defendant as final, and now brings her action for damages. Her complaint in the action and the evidence taken at the trial are sufficient to establish such a claim. Her damages are, as on the other hypothesis, *prima facie* the entire amount of her compensation, unless proof was offered in mitigation of damages, which was not done.

3. Duty of Care for Safety of Employees.

Brown v. Winona & St. Peter Railroad Co. 27 Minn. 162.

The plaintiff, an employee of the defendant railroad company, was injured by the negligence of Jacks, a road master. He seeks to recover damages for his injury.

Held, that a master is not liable for injuries occasioned to a servant by act of a fellow servant.

Gilfillan, C. J.

That as a general rule the master is not liable to one servant for an injury caused by the negligence of another servant in the same common employment, is held by every court which decides according to the principles of the common law. The rule has strong considerations of public policy, as well as private justice, to sustain it. In the case of a stranger, the rule *respondet superior* applies in all its force. In such case, the act of the servant within the scope of his employment, however inferior may be his grade or authority, is the act of the master, and his negligence is the negligence of the master, for the consequences of which the latter is responsible, as he is for his personal act and negligence. The rights of the stranger against the master are not modified by any contract relation. The duties and rights of master and servant, with respect to each other, are controlled by the contract of employment, which impliedly imposes duties and risks upon each. No case, not governed by statute, holds the master liable at all events to a servant injured by the negligence of another servant in the same employment. No case intimates that the master is an insurer of the servant against possible injury.

The duties which the contract of employment imposes on the master are that, where machinery or instrumentalities are to be used in the work, he will exercise due care and caution in providing such as are fit and safe; and, where co-servants are to be employed, he will use due care and caution in selecting such as are competent and careful. For injuries arising from failure to perform these duties the master is liable, and he cannot avoid the liability by deputing another to perform them in his stead. There are cases which appear to add to these duties the duty not to have the servant set, either by the master or by one whom he places in authority over him, to do work more dangerous than he engaged to do, or to do unusually hazardous work, where, from youthfulness or feebleness of intellect, the servant may be supposed to be unable to appreciate the danger and guard against it, or the hazards of which are known to the master, but are unknown to, and not open to the observation of, the servant. There is nothing in this case to make it necessary for us to decide on these propositions, or do more than allude to, without expressing any opinion on, them.

All the authorities, where there is no statute on the subject, agree that in the contract of employment the servant assumes such risks as—the master having performed the duties we have mentioned—are still necessarily incident to the business or work which he engages to do, and which risks he may be taken to have in mind when he enters the employment. Where he is to work with or about machinery, as, notwithstanding any degree of care in providing it, there is still, ordinarily, the possibility of injury from its use, he must be supposed to take that risk on himself; and because, notwithstanding the utmost care and caution in selecting them, there is danger of injury from the negligence of fellow-servants, he is held to assume that risk.

These are risks which are necessarily incident to the employment. If a workman or servant is to work in conjunction with others, he must know that the carelessness of his fellow-servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant, on entering upon the employment, is supposed to know and assume this risk. The reason given for holding the servant to assume the risk of injury from negligence of his fellow-servants—to wit, that he must know, when he enters upon the employment, that neither care nor diligence by the master can prevent it—we think indicates what servants are to be regarded as fellow-servants, the risk of whose negligence is assumed by a servant when entering upon the employment.

It is upon this point that the authorities disagree. Some courts hold that where the injured servant is subordinate to him whose negligence causes the injury, they are not "fellow-servants," and the master is liable. On the other hand, the great majority of courts both in this country and in England hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow-servants as regards the liability of the master for injuries to one caused by the negligence of the other. If the servant is supposed to assume the risks which the master, with due care and diligence, cannot prevent, and we think it is so, then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself. For, in respect to such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence any more than he can prevent the casual negligence of those inferior in grade. This conclusion is decisive of this case, for the road-master was no more than a superior servant or overseer, the risk of whose negligence was assumed by plaintiff when he entered upon the employment.

4. Duty of Agent to Follow Instructions.

Heinemann v. Heard. 50 N. Y. 27.

Heinemann & Payson instructed Heard & Company at Hong Kong to buy silk for them at a specified price. Heard & Company did not buy at this price when they could have done so, as they expected the market to fall. The market rose and they were unable to make the purchase as directed. Heinemann & Payson sue Heard & Company for failure to obey their instructions to purchase at the specified price.

Held, that an agent must follow instructions given him by his principal.

Rapallo, J.

The question in the case was one of due diligence, and we think that there was sufficient evidence to go to the jury on that point. The position cannot be maintained that fraud on the part of the agent is necessary to subject him to an action for neglecting to perform a duty which he has undertaken. An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Whether or not he has exercised such skill and diligence is usually a question of fact; but its omission is equally a breach of his obligation and injurious to his principal, whether it be the result of inattention or incapacity, or of an intent to defraud.

5. Duty to Exercise Good Faith.

Farnsworth v. Hemmer. 1 Allen (Mass.) 494.

Farnsworth, a real estate broker, effected an exchange of real estate between Hemmer and Mrs. Cooper. He had been commissioned by them to exchange their respective properties. Without the knowledge of either, he charged a commission to both and now seeks to recover the one charged to Hemmer.

Held, that an agent must act in good faith with his principal and must not represent the other party.

Bigelow, C. J.

The principle on which rests the well settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is entrusted to him to sell, is equally applicable when the same person without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interests of his employer. This he cannot

do, where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their consent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound in the exercise of good faith to disclose to them.

6. Duty to Act in Person Unless Otherwise Authorized.

Exchange National Bank of Pittsburgh v. Third National Bank of New York. 112 U. S. 276.

The Exchange Bank of Pittsburgh sent drafts to the Third National Bank of New York to be collected from the drawee, the Newark Tea Tray Company of Newark. The New York Bank sent the drafts to the First National Bank of Newark, which allowed them to be accepted personally by the Secretary of the Tray Company, instead of by the corporation itself. Subsequently, the drafts were not paid, and the Exchange Bank sues the New York Bank for not obtaining acceptance by the drawee or protesting the drafts if acceptance were refused.

Held, that according to the United States rule, a bank which takes a draft for collection is liable for the negligence of a correspondent bank to which it entrusts that collection.

Blatchford, J.

It is contended by the defendant that its liability, in taking at New York for collection these drafts on a drawee at Newark, extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent, with proper instructions; and that the Newark bank was not its agent, but the agent of the plaintiff, so that the defendant is not liable for the default of the Newark bank, due care having been used in selecting that bank. Such would be the result of the rule established in Massachusetts. The authorities which support this rule rest on the proposition that, since what is to be done by a bank employed to collect a draft payable at another place cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the sub-agent; and that the incidental benefit which the bank may receive from collecting the draft, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the sub-agent.

The contrary doctrine, that a bank receiving a draft or bill of exchange in one state for collection in another state from a

drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other state, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York and elsewhere.

The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the New York bank first receiving these drafts for collection is responsible for the loss or damage resulting from the default of its Newark agent.

The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant undercontractors or subagents when defaults occur injurious to his interest.

Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent where from the nature of the business it was evident he must employ subagents. The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing done, and the undertaking is for the due use of all proper means of performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used.

By the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection from the default of its correspondent in Newark.

7. Liability of Gratuitous Agent.

Thorne v. Deas. 4 Johns. (N. Y.) 84.

The plaintiffs owned one-half of a vessel and the defendant, the other half. The defendant agreed to insure the vessel for the benefit of both parties, but neglected to do so. The ship was wrecked, and the plaintiffs sue the defendant for his negligence in failing to effect the insurance.

Held, that while a gratuitous agent is liable for misfeasance, he is not liable for nonfeasance.

Kent, C. J.

The offer, on the part of the defendant, to cause insurance to be effected, was perfectly voluntary. Will, then, an action lie, when one party entrusts the performance of a business to another, who undertakes to do it gratuitously, and wholly omits to do it? If the party who makes this engagement enters upon the execution of the business, and does it amiss through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But the defendant never entered upon the execution of his undertaking, and the action is brought for the nonfeasance.

A short review of the leading cases will show that by the common law, a *mandatary*, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages are averred.

If the defendant had been a broker, whose business it was to procure insurances for others, upon a regular commission, the case might possibly have been different. It is very clear, from this case, that the defendant undertook to have the insurance effected, as a voluntary and gratuitous act, without the least interest in the vessel with the plaintiffs, and what he undertook to do was as much for his own benefit as theirs. It might as well be said that, whenever one partner promises his copartner to do any particular act for the common benefit, he becomes in that instance a factor to his copartner, and entitled to a commission. The plaintiffs have, then, failed in their attempt to bring this case within the range of the decisions or within any principle which gives an action against a commercial agent who neglects to insure for his correspondent. Upon the whole

view of the case, therefore, we are of opinion that the defendant is entitled to judgment.

B. Ostensible Authority of Agent.

1. Agent to Sell: To Fix Terms of Sale.

Daylight Burner Co. v. Odlin. 51 N. H. 56.

Moore, who was selling goods for the plaintiff under authority to sell for cash only, sold to Berry on credit. The plaintiff shipped the goods C.O.D. by the defendant, an expressman, who delivered them to Berry upon an order from Moore stating that the goods should be delivered without payment of the purchase price. The Burner Company sues for the delivery of the goods without receiving the purchase price.

Held, that an agent to sell has ostensible authority to fix the terms of the sale.

Bellows, C. J.

From the uncontradicted testimony of the plaintiff and the finding of the jury, it may be assumed that Moore was clothed by the plaintiff with an apparent authority, like that of a factor, to sell all the goods of the plaintiff he could sell within his business circuit, on a commission of ten per cent.

As incident to that general authority, he had power to fix the terms of sale, including the time, place, and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course to be controlled by proof of the mercantile usage in such trade or business.

There is some conflict in the adjudged cases upon the question of the authority of a factor to sell on credit, but we think the weight of modern authority is in favor of the position that he may sell on credit, unless a contrary usage is shown.

We have a case, then, where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit, as he might think proper; and this being so, Moore must be regarded, in respect to third persons, as the plaintiff's agent, whose authority would not be limited by instructions not to be brought to the notice of such third persons.

As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery of the goods so sold and sent to his order, for the purpose of making it conform to the contract of sale, would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the

agent's want of authority. As to him the agent's apparent authority was real authority.

The marking of the package by another agent of the plaintiff, to the effect that cash was required on delivery, was not in law notice of such want of authority, although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose.

2. Agent to Sell: Warranty.

Herring v. Skaggs. 62 Ala. 180.

Stewart, a salesman of Herring's firm, sold Skaggs a safe, warranting it to be over a certain thickness, and burglar proof. Burglars took money and valuables from the safe with little difficulty. Skaggs sues on the warranty.

Held, that, in the absence of custom, an agent to sell has no implied authority to warrant.

Stone, J.

We are not prepared to assent to the doctrine in unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. "Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." As a general rule, the agent has power to do whatever is usual—to enter into such express stipulations as are usual and customary—in effecting such sales. What stipulations are usual and customary in effecting such sales, is not always matter of judicial knowledge. It cannot be affirmed that the custom of giving warranties exists in the sale of all chattels. Generally, and we hold in a sale like the present, it is a question for the jury to determine what is usual. This, in the absence of express authority in the agent to warrant; for if the agent had such express authority, then his act is the act of his principal. And, in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, "in the absence of prohibition" resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal had himself given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act

of such agent, although the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase-money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar proof. Either the express authority, or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority from the fact that Stewart, who conducted the sale, was a general agent.

3. Agent to Sell: To Receive Payment.

Higgins v. Moore. 34 N. Y. 417.

Higgins sold Moore a cargo of rye through a grain broker. Moore paid the price to the broker, who did not remit to Higgins. Higgins' firm now sues for the price.

Held, that an agent to sell, who has not possession of the goods, has no ostensible authority to receive the purchase price.

Peckham, J.

The general doctrine is, that a broker employed to sell has no authority as such to receive payment. Exception is made to this general rule in some cases where the principal is not disclosed. An agent to conclude a contract is not, of course, authorized to receive payment thereunder.

Where the person contracting for the sale has the property in his possession, and delivers it, he is clothed with the *indicia* of authority to receive payment, especially when the owner is not known. He is then clothed with apparent authority, and that, as to third persons, is the real authority.

In the case at bar, however, the broker never had possession of the rye, and never delivered it; but the plaintiffs retained possession till they delivered to the defendant, and they were well known to the defendant; one of them had taken part in the negotiation for the sale, as owner, in the city of New York. The broker was simply authorized to make a contract for the sale. This was the whole of his authority in reality, and he had no other or further apparent authority.

4. Agent to Sell: Payment of Commission.

Hibbard, Spencer & Bartlett v. Peck. 75 Wis. 619.

Bennet, a traveling salesman in the employ of the plaintiffs, sold goods to Peck. In an action for the purchase price, Peck sets

up in part satisfaction of the debt an agreement between Bennet and himself, that if Peek would assist in securing a certain order from Nelson, he would be paid a commission for so doing.

Held, that a principal is not bound by a salesman's agreement to pay a commission to a third party.

Cole, C. J.

The plaintiff never gave its traveling salesmen any authority whatever to grant commissions, or even credits, on goods sold by them. It is clear, therefore, that Bennet had no express authority to bind his principal to pay the defendant commissions on goods sold Nelson, even if such a contract were made.

Had he an implied authority, growing out of the usage or custom in the hardware trade, to render his principal liable for such commissions?

The authority of an agent in any given case is incident to the character bestowed upon him by the principal. If the principal has, by his express act or as the logical result of his words or conduct, impressed upon the agent the character of one authorized to act and speak for him in a given capacity, authority so to speak and act follows as a necessary incident of the character, and the principal, having conferred the character, will not be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to impose so much authority, or that he had given the agent express directions not to exercise it; and where the principal confers upon the agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage. The usage of a particular trade or business, or of a particular class of agents, may be shown, not for the purpose of enlarging the powers of the agent employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power, and may be resorted to by all agents, and especially by commercial agents.

But the evidence of the usage, in a case like this, should be clear and satisfactory, and should show that the usage has so long continued, and has been so uniform, that merchants in that kind of business may be presumed to authorize their agents to sell their goods in the ordinary way in which such goods are sold, and in reference to such custom. The evidence in the present case, falls far short of establishing the usage or custom in the hardware business of traveling salesmen making contracts on behalf of their principals to pay commissions to third parties for aid in procuring orders from those to whom goods are sold. It is quite clear that the defendant's recommendation sent to Nelson did not have any influence upon the latter in inducing him to make the purchase he did; but, had the fact been otherwise, we do not think the plaintiff was bound by the contract

of Bennet to pay the defendant the commission he claims, as it was beyond the scope of his authority to make such a contract.

5. Agent to Sell: Exchange.

Taylor & Farley Organ Co. v. Starkey. 59 N. H. 142.

The Organ Company sues to recover the value of an organ which was delivered to Starkey by Davis, an agent of the plaintiff, who was authorized to sell on commission. Davis exchanged the organ for a buggy and \$40 in cash.

Held, that an agent to sell has no authority to exchange.

Stanley, J.

The contract between the plaintiffs and Davis was properly admitted. It was evidence of the agreement under which Davis was in possession, and tended to show that his authority was to sell, and not to exchange. In the absence of evidence to the contrary, to sell means to sell for cash. Davis, having no authority except to sell for cash, could not lawfully exchange for other property, either in whole or in part, and if he did the title would not pass, for the plaintiffs did not hold Davis out, or authorize him to hold himself out, as owner of the organ.

6. Agent to Sell: To Rescind Sale.

American Sales Book Co. v. Whitaker. 100 Ark. 360.

The plaintiff had sold supplies to Whitaker through a traveling salesman, who afterwards rescinded the sale. The Sales Book Company refuses to recognize the authority of the salesman to rescind the sale when once made, and sues to recover the purchase price.

Held, that an agent to sell has no authority to rescind a sale when once made.

Frauenthal, J.

It is well settled, we think, that the power which an agent has to bind his principal rests upon the authority which the principal has given to him. If the agent has acted without authority, or outside of the scope of his authority, real or apparent, then the principal is not bound for such act. One who deals with an agent is at once put upon inquiry, and must discover whether the agent has the authority to do the proposed act. But where the agency is proved, without showing its extent, then it is presumed that general authority has been given in regard to the business in which such agency is concerned. Without notice to the contrary, the agent is presumed

to have authority to do all acts necessary to carry out the particular employment in which he is engaged by the principal.

This court has held that a third person has a right to assume, without notice to the contrary, that the traveling salesman of a wholesale house has an unqualified authority to act for the firm which he represents in all matters which come within the scope of that employment. The object of the employment, and the authority, real or apparent, given to an agent who makes sales or solicits for goods, is to do all those things and to enter into such agreements as are necessary to make the sales or to secure the orders for the goods. He has the authority, real or apparent, to agree upon the terms of the sale and to sell conditionally or unconditionally, where the person with whom he deals has no notice of any limitation upon his authority. But, according to the great weight of authority, an agent who is only empowered by his principal to solicit orders for, or to make sales of, goods has no implied authority to receive payment therefor or to modify or cancel such sales. After an order is executed or a sale completed, the authority of the agent in the matter is at an end. His authority is only to make contracts, to solicit orders for goods, or to make sales thereof. He has no implied power to give up interests that have been acquired, or to cancel rights which have been obtained. The agent who solicits orders for, or makes sales of, goods has no implied power, once the order is executed or the sale made, either to modify or to rescind the contract. It is a well settled rule that an agent with authority to sell goods has no authority, after a contract of sale has been completed or executed, to revoke or rescind a sale and receive back the goods which he had previously sold, or to alter his contract in any material part.

7. Agent to Purchase.

Brittain v. Westall. 137 N. C. 30.

Westall authorized Townsend to buy lumber for him for cash which he advanced for that purpose. Townsend bought lumber for him on credit from the plaintiff, and it was delivered to Westall, who supposed it had been paid for. The plaintiff now sues Westall for the purchase price.

Held, that an agent authorized to buy for cash may purchase on credit only when there is a custom to that effect, or ratification.

Walker, J.

An agent was given authority to purchase personal property for his principal, but only so far as he had cash of his principal with which he was to pay for it. The agent purchased on the credit of the principal without paying any money, and the property was delivered to the principal, who received and converted it to his own use. The court held that when the agent violated his express instruc-

tions and bought on credit instead of for cash, the principal had the right to repudiate the contract and to refuse to receive the articles, but having received and used them with knowledge that they had been purchased for him and upon his credit, the vendor could recover from him the price of the goods. It was said that the same result would follow whether the agent acted contrary to his authority, exceeded it, or had none at all, it being the simple case of the goods of one man coming to the use of another, which he knows are not intended as a gift, but are sent to him upon the expectation that he will receive and pay for them. A mere agency to purchase does not always and necessarily imply authority to pledge the credit of the principal, and when the agent is furnished with funds for the purpose of making purchases on his principal's account, he cannot bind the latter by a purchase on credit, unless perhaps, such is the well known custom of trade, or unless the principal, with notice of the facts, ratifies the transaction. When the authority to buy or sell is given in general terms, it is clear, in the absence of any restriction to the contrary, that the agent has the power to buy for cash or on credit as he may deem best, and to sell in the same way. It may be taken then as a settled principle in the law of agency that if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase, and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because, when an agent is authorized to do an act for his principal, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted. An agent to purchase property must, in order to bind his principal, who furnishes in advance the funds to make the purchase, buy for cash, unless he has express power to buy upon credit or unless the custom of the trade is to buy upon credit, and in the absence of such express authority or of such a custom, the agent cannot bind his principal by a purchase, upon credit, of a person who is ignorant of his real authority, as between himself and his principal, unless the property so bought is delivered to the latter and he receives it knowing that his agent actually bought on credit or that he had no funds in his hands at the time with which to buy the same.

8. General Agent.

Lowenstein v. Lombard, Ayres & Co. 164 N. Y. 324.

Lowenstein sues to recover the value of merchandise shipped from New York on a vessel belonging to the defendants, which was lost at sea. Middleton, the defendant's agent at Mobile, agreed to insure the merchandise shipped without requiring a declaration of the value of the goods before the sailing of the vessel. He had authority to insure goods, but only upon such declaration.

Held, that the authority of a general agent extends to the execution of contracts usually made by such agents.

Cullen, J.

Middleton was not the universal agent or *alter ego* of the defendant, but as to the business confided to him he was a general agent. The circulars and notices directed persons interested to "for rates of freight or passage apply to R. Middleton, agent, Mobile; W. J. Best, Agent, No. 12 Broadway, New York." The general rule is, "where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of the situation." The powers of the agent are, *prima facie*, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. The evidence shows that the other transportation lines doing business between Mobile and New York gave free insurance without requiring declaration of value to shippers of freight over those lines, and had done so for a long period. Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and publicly known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith, and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice. The authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold, and the principal is bound as to third persons acting in good faith by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. We think, therefore, that Middleton had the apparent power to make the agreement sued upon unless the plaintiff had notice of limitation placed on that authority by the principal.

9. Superintendent.

The Jackson Paper Manufacturing Co. v. The Commercial National Bank. 199 Ill. 151.

The Jackson Company brings this action against the bank to recover its loss upon a check payable to the plaintiff's order. The check was cashed by the bank upon the indorsement of the plaintiff's name by its superintendent, who took the money and absconded with it.

Held, that a superintendent has no authority to indorse checks.

Magruder, C. J.:

Jackson had no express authority from the appellant to indorse checks in its name. Indeed, it is not contended by the appellee that Jackson had any express authority to make any such indorsements, but it is claimed that he had implied authority so to do. The appellee contends that his authority to make the indorsement is to be implied from the nature of his duties as appellant's superintendent and manager, and from his conduct in connection with the business of appellant.

The weight of authority seems to be in favor of the contention of appellant, that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority. In other words, the power of an agent to indorse commercial paper for his principal must be a necessary implication from an express authority conferred upon such agent. Wherever such power is implied from the acts of the agent, the acts, subject to such implication, must be acts of a kind like those from which the implication is drawn.

"An agent's acts in making or transferring negotiable paper (especially if by indorsement) are much restrained. It seems that they can be authorized only by express and direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them."

The power of an agent to bind the principal by the making or indorsing of negotiable paper can only be charged against the principal by necessary implication, where the duties to be performed cannot be discharged without the exercise of such a power, or where the power is a manifestly necessary and customary incident of the character bestowed upon the agent, and where the power is practically indispensable to accomplish the object in view. An agent cannot bind his principal by making or indorsing notes for his own benefit, or the benefit of third persons.

It is true that Jackson was the superintendent of appellant's mill, and managed the business of running the mill; but, an agent having general authority to manage his principal's business has, by virtue of his employment, no implied authority to bind his principal by making, accepting or indorsing negotiable paper. Such an authority must be expressly conferred, or be necessarily implied from the peculiar circumstances of each case. It may undoubtedly be conferred, and by implication, but it will not be presumed from the mere appointment as general agent.

While it is well settled that an authority to draw, accept or indorse bills may be presumed from acts of recognition in former instances, yet those acts must be known to the party setting them up.

10. Doctrine of Estoppel Not Applicable to Public Agents.

Whiteside v. United States. 93 U. S. 247.

The Secretary of the Treasury appointed special agents to receive and collect abandoned or captured property in the southern states during and following the Civil War, with one of whom Whiteside contracted that he should be paid one half of the value of property he might recover, and be reimbursed for expenses incurred in collecting such cotton as might subsequently be released by the government. The special agent had no authority to contract for greater compensation than one quarter of the amount actually retained, inclusive of all expenses. Whiteside recovered an amount of cotton which was subsequently returned to the owner by the military officer of the district. Whiteside contends that he is entitled to his expenses, as the act of the military officer prevented his securing the entire amount to which he would otherwise be entitled, basing his claim upon the ostensible authority of the special agent of the Treasury Department to make the contract with him.

Held, that the public is not bound by the rules relating to the ostensible authority of agents.

Clifford, J.

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration for the government.

Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public.

Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

C. *Liability for Torts of Servant or Agent.*

1. In General.

Barwick v. English Joint Stock Bank. L. R. 2 Ex. Cas. (Eng.) 259.

Barwick supplied Davis & Sons with oats on credit, upon a guaranty given by the manager of the defendant bank that checks drawn by Davis to the plaintiffs in payment of the oats would on receipt of money by the bank for Davis have priority over any other payment, except to the bank. The manager of the bank fraudulently concealed the fact that Davis and Sons owed the bank £12,000. When money was paid to the bank for the account of Davis & Sons, it applied the entire amount to its own debt. Barwick sues upon the guaranty, claiming that on account of the fraudulent concealment by the agent of the bank, he is entitled to the sum received.

Held, that a principal is liable for an unauthorized fraud committed within the scope of the authority of the agent.

Willes, J.

With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment in cases where officers of railway companies, entrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.

2. Fraud Committed for Benefit of Agent.

Lloyd v. Grace, Smith & Co. (1912) A. C. (Eng.) 716.

Mrs. Lloyd, a widow who owned two cottages and a sum of money secured by mortgage, being dissatisfied with the income derived therefrom, consulted Sandles, the managing clerk of the defendant firm of solicitors, in reference to a change of investment. He fraudulently procured the deeds from her and caused her to sign a conveyance to him of the cottages and the mortgage. He then disposed of the cottages for his own benefit. Mrs. Lloyd sues the firm for the fraud of Sandles.

Held, that a principal is responsible for the fraud of an agent committed for his own benefit.

Lord Macnaghten:

The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

3. Wilful Torts of Servant.

Howe v. Newmarch. 12 Allen (Mass.) 49.

Brown, engaged in the delivery of bread as a servant of the defendant, drove on the sidewalk in front of Howe's premises in violation of a statute, and injured Howe, who sues for damages.

Held, that a master is responsible for torts wilfully committed by a servant.

Hoar, J.

The instruction requested by the plaintiff at the trial that "if at the time of the injury the defendant's servant was engaged in the business of the defendant, and within the scope of his duty as such servant, and he drove the horse over the plaintiff and did him an injury, the defendant is responsible, whether the act was done wilfully or negligently, the plaintiff being in the exercise of due care himself," seems to have been stated with substantial accuracy. It makes the test of the defendant's liability, not the intention of the servant, but the fact that the injurious act was done while engaged in his master's business and within the scope of his duty as a servant. If the act of driving over the plaintiff was done wilfully, still it may also have

been done negligently in the view of the law; that is, in disregard of the plaintiff's rights, and neglect and omission of the precautions necessary to his safety. It is obvious that the test of the master's liability cannot be whether the servant is a trespasser; whether his violence be accidental or intentional, if it is without lawful justification. But if the servant is strictly within the scope of his employment, doing his master's work, and, for the purpose of doing what he is employed to do, does it in a manner which violates the rights of another, it is difficult to see why the master should be exempted from responsibility, because the servant knows that his act will be injurious, and intends to do it. If the consent of the master is made the ground of his liability, the master is no more consenting to the thoughtless negligence of his servant than to his wilful negligence. The authorities all agree that, where an action is brought against the master for an injury occasioned by the servant's negligence in his service, it is no defense to show that the master directed the servant to be careful; or even that he cautioned him against the particular act of negligence which produced the injury.

The act which causes the injury may be precisely the same, whether merely careless or intentional, and the authority of the master wanting as much in one case as in the other.

The rule may be stated thus: The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But if the master gives an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work. So that if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner.

4. Servants for Whose Acts Master is Responsible.

Haluptzok v. Great Northern Railway Co. 55 Minn. 446.

Haluptzok, who was properly on the premises of the defendant railway company, was injured by the negligent handling by O'Connell of a truck belonging to the defendant. O'Connell was

allowed by the station agent to learn telegraphy in the station, and in return helped with the work without compensation. The railroad did not authorize the employment, but another man had been employed in the same way previous to the accident.

Held, that although a master is not liable for the acts of a servant not employed with his consent, such consent may be either express or implied.

Mitchell, J.

Under the doctrine of *respondeat superior*, a master, however careful in the selection of his servants, is responsible to strangers for their negligence committed in the course of their employment. The doctrine is at best somewhat severe, and, if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be. Hence, we think, in every well-considered case where a person has been held liable, under the doctrine referred to, for the negligence of another, that other was engaged in his service either by the defendant personally, or by others by his authority, express or implied. There is a class of cases which seem to hold that a person may be liable for the negligence of another, not his servant. But these were generally cases where the injury was done by a contractor, subcontractor, or their servants, upon the real estate of the defendant, of which he was in possession and control; and they seem to proceed upon the theory that, where a man is in possession of fixed property, he must take care that it is so used and managed by those whom he brings upon the premises as not to be dangerous to others. In that view, he is held liable, not for the negligence of another, but for his own personal negligence in not preventing or abating a nuisance on his own premises. There will also be found statements to the effect that where a servant is employed to do a particular piece of work, and he employs another person to assist him, the master is liable for the acts of the person so employed as much as for the servant himself. Thus generally stated, without qualification, the proposition is misleading, as well as inaccurate.

A master, as such, can be held liable for the negligence only of those who are employed in his work by his authority, and hence, if a servant who is employed to perform a certain work procures another person to assist him, the master is liable for the sole negligence of the latter only when the servant had authority to employ such assistant. Such authority may, however, be implied as well as express, and subsequent ratification is equivalent to original authority; and, where the servant has authority to employ assistants, such assistants, of course, become the immediate servants of the master, the same as if employed by him personally. Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent on the part of

the master may be inferred. It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering service for him by his consent, express or implied.

5. Deviation.

McCarthy v. Timmins. 178 Mass. 378.

Scott, the driver of a team belonging to Timmins, negligently struck and injured McCarthy. Scott had been ordered to take the team to the stable, but instead of doing so, he was driving to a saloon for purposes of his own at the time the accident occurred. The defense is that Scott was not acting in the course of his employment when the accident occurred.

Held, that a master is not liable for torts of his servant done when the servant has deviated from his employment.

Hammond, J.

The well established rule as to the extent of the liability of the master for the act of his servant, so far as material to this case, is that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible, but if it is done in the execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act be negligent or wilful.

The only trouble is in the application of the rule, and it is not easy to reconcile the cases. Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables, and there can be no doubt that so long as he drove the team with that end in view, and for that purpose and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston Street rather than Commonwealth Avenue, but when he reached Massachusetts Avenue, it is plain that his only purpose in turning southward instead of northward, and going seven hundred and fifty eight feet to Dundee Street, was not only to deviate from the regular way of reaching the stable but was for a purpose of his own, namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables even by a circuitous route. He was doing an act wholly for a purpose of his own, disregarding the object for which he was employed and not intending by his act to execute it, and not within the scope of his employment. In such case the defendant should not be held answerable.

6. Servant Loaned to Another.

Driscoll v. Towle. 181 Mass. 416.

Driscoll was injured by the negligent driving of Keenan, who was in the employ of the defendant, Towle. Towle was engaged in the general teaming business and had contracted with the Boston Electric Light Company for the entire use of his team. At the time of the accident, Keenan was working under instructions of the Electric Light Company. Towle defends the action on the ground that as Keenan was at that time not in his service, but in that of the Electric Light Company, he is not liable for the negligence of Keenan.

Held, that while a servant may be loaned to another in such a way as to exempt the master from liability for his acts, the facts of this case do not present that situation.

Holmes, C. J.

It is true, of course, that a person admitted to be in the general employment of one may be lent to another, (with his own consent), in such a way as to become the servant of that other for the occasion or for the time. Many cases have been decided on this ground. They generally depend upon the nature of the contract or arrangement, express or implied, between the general master and third person. But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant. More than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign, —as the master sometimes was called in the old books.

The person who receives orders (from the party who has made a bargain with his master), is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master had undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.

In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect of the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street.

7. Liability for Act of Compulsory Employee.

Homer Ramsdell Transportation Co. v. La Compagnie Générale Transatlantique. 182 U. S. 406.

The Transportation Company sues for damages to its wharf caused by one of the defendant's ships. The defendant contends that the accident was occasioned by the negligence of the pilot, whom the company was required by law to employ, and over whose actions it had no control.

Held, that a master is not liable for torts of a servant over whose acts he has no control.

Gray, J.

The liability of the owner at common law for the act of a pilot on his vessel is well stated by Mr. Justice Story; "The master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntarily, although he is necessarily required to select from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and, if he is bound to do so under a penalty, then, and in such a case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of a pilot; for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them, and the maxim, *Qui facit per alium facit per se*, does not apply."

The answer to the question must therefore be that in an action at common law the shipowner is not liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily.

8. Independent Contractor.

Boomer v. Wilbur. 176 Mass. 482.

The plaintiff sues for personal injuries occasioned by the falling of brick and mortar from a building belonging to Wilbur, while he was passing on the sidewalk. The brick and mortar fell owing to the negligence of a contractor who was repairing the chimney under a contract to do so for a fixed sum.

Held, that a master is not liable for torts of an independent contractor engaged upon his business.

Hammond, J.

While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. There are, however, some well known exceptions to the rule. If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, and if the contract cannot be performed except under the right of the employer, who retains the right of access, the law may hold the employer answerable for negligence in the performance of the work.

This is not a case where the work, even if properly done, creates a peril unless guarded against. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. The work could not be classed as work which, if properly done, was ordinarily attended with danger to the public.

The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held.

9. Torts of Public Servants.

Welsh v. The Village of Rutland. 56 Vt. 228.

Mrs. Welsh was injured by slipping on ice formed as a result of the negligent thawing out of a frozen hydrant by the fire department of the village. She sues the village for this negligence.

Held, that a public body is not liable for the torts of its agents committed in the execution of governmental functions.

Royce, C. J.

At common law it has been a settled principle ever since 1788, that an individual cannot sustain an action against a political subdivision of the state based upon the misconduct or nonfeasance of public officers. The reasons assigned in the earlier cases were that the maxim which declares it better for the individual to suffer than for the public to be inconvenienced, is stronger than the other principle, that for every injury the law gives a remedy, and that the plaintiff might levy his execution upon the property of an individual inhabitant—the organization having no fund legally applicable to its payment—thus giving rise to multiplicity of actions to enforce con-

tribution and great public annoyance. But the more modern and broader ground is said to be, that these *quasi* corporations are mere instrumentalities for the administration of public government and the collection and disbursement of public moneys, raised by taxation for public uses, and which cannot lawfully be applied to the liquidation of damages caused by wrongful acts of their officers.

This rule of exemption extends necessarily to municipal corporations so far as the reason of it applies, and that is so far as the acts done are governmental and political in their character and solely for the public benefit and protection; or the negligence or non-feasance are in respect of the same matters. Instances of this non-liability may be found in numerous cases. The immunity goes a step farther and protects such corporations in a total neglect to perform certain functions which are concededly for the public benefit and convenience. No action can be maintained against a municipal corporation by an individual, no matter how great an injury he might be able to show, for the neglect to build sewers or water-works, or for defects or insufficiencies in the plans adopted for these or other public improvements; and this is upon the ground that in such matters the corporation is discharging a legislative or *quasi* judicial function, and its action is not reviewable by the law courts. If the plan adopted for the construction of such public works is not necessarily injurious or dangerous to private interests, and is executed with reasonable skill and prudence, the protection against liability is absolute. And the same rule applies to the action of municipal corporations in changing or grading their streets.

When, however, municipal corporations are not in the exercise of their purely governmental functions for the sake and immediate benefit of the public, but are exercising as corporations private franchise powers and privileges, or dealing with property held by them for their corporate advantage, gain or emolument, though inuring ultimately to the benefit of the general public, then they become liable for negligent exercise of such powers precisely as are individuals. So, of the construction and maintenance of water-works; of ditches or drains; of bridges or culverts, and in respect of structures which may obstruct the flow of natural water courses and of the pollution of them by sewage and the like; and public works and improvements generally.

The fire department and its service are of no benefit or profit to the village in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid—not out of any special receipts or fund, nor defrayed, even in part, by assessment upon particular persons or classes benefited, as in case of sewers or water works—but from the general fund raised by taxation of all the inhabitants. The members or employees of the department are, while acting in the line of duty prescribed by them, not agents of the corporation in the sense which renders it liable for their acts, but are in the discharge of an official duty as public officers. To them the doctrine of *respondet superior* does not apply.

10. Torts of Agents of Charitable Organization.

Hearns v. The Waterbury Hospital. 66 Conn. 98.

Hearns sues for damages arising from unskilful and negligent treatment while a patient in the hospital, a charitable corporation.

Held, that a charitable corporation is not usually responsible for torts committed by its employees.

Hamersley, J.

All questions essential to the disposition of the case presented by this appeal are settled by deciding upon the liability of the defendant for the negligence of its servants; i.e., when a corporation like the defendant employs a servant who does not represent it in the way that every corporation must be represented by its directors or managers, but is simply employed for a special work in the same manner as if employed by an individual for the same work—is such corporation liable for an injury caused in the course of his employment by such servant, and due solely to his negligent conduct?

This question has never been decided in this state; it has, however, arisen in other states and in England; and has been so intermingled with the different one of the corporate liability of eleemosynary corporations for their own corporate negligence, that the review we make of cases illustrating the treatment the subject has received from other courts, will necessarily include some cases bearing more directly on the latter question.

We think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence, in the failure to perform a duty imposed on it by the law; and we are satisfied that this general conviction rests on sound legal principles.

The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim *qui facit per alium facit se*, is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy.

The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distinguished as the doctrine of *respondeat superior*. The practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned.

We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule and to declare a new public policy and say: On the whole, substantial justice is best served by making the owners of a public charity, involving no private profit, responsible not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of *respondeat superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondeat superior* does not justify such extension of the rule; or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant—whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty—is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong.

D. Liability of Agent to Third Party.

I. In General.

McCarthy v. Hughes. 36 R. I. 66.

McCarthy, a constable, sues for fees earned in serving writs for Hughes, who conducted a collection agency. Hughes defends on the ground that he acted as agent for the persons for whom collections were made, and is accordingly not personally responsible.

Held, that although an agent who discloses his principal is not ordinarily liable on contracts entered into in accordance with his authority, the rule does not apply when credit is given the agent personally.

Johnson, C. J.

The defendant contends that the plaintiff as a constable in serving said writs was informed by the writs as to who was the principal; that the defendant was the agent of the creditor or principal disclosed in each writ; that the defendant exonerated himself from any liability by reason of his having disclosed the name of his principal through its appearance upon the writ, especially since he made no express agreement to pay such fees.

In general, when a man is known to be acting and contracting merely as the agent of another, who is also known as the principal, his acts and contracts, if he possesses full authority for the purpose, will be deemed the acts and contracts of the principal only, and will involve no personal responsibility on the part of the agent, unless the other expressly or impliedly incurred, or intended to incur, such personal responsibility.

Was Hughes, however, merely the agent of the various parties for whom he had undertaken to collect bills, and did he merely as such agent employ McCarthy? Can it certainly be said that the circumstances of the case do not lead to the conclusion that he has either expressly or impliedly incurred or intended to incur, personal responsibility? It is undisputed that he advertised himself as a collector of bills, and that he carried on the business of collecting bills.

In our opinion a collection agency, in taking steps for the collection of accounts, in the absence of a special contract limiting its liability, and no such contract is here claimed, is an independent contractor, and is liable to those whom it employs in the business of making collections. We see no reason for a distinction in this respect whether the employee is an attorney or a constable.

2. For Torts.

Lough v. John Davis & Co. 30 Wash. 204.

The plaintiff was injured by reason of the unsafe condition of a house which it was the duty of the defendant, as agent, to rent and keep in repair. The defendant insists that the failure to repair represents merely the omission of a duty to the principal, and that a third party may not take advantage of such an omission.

Held, that a paid agent is liable for nonfeasance as well as misfeasance.

Dunbar, J.

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that, the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts.

The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and

the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

In *Osborne v. Morgan*, 130 Mass. 102, an agent of premises was held responsible to a third person for suffering to remain suspended from a room a tackle block which fell upon and injured the plaintiff. The court, speaking through Chief Justice Gray, said:

"The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by

reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly."

There is still another class of cases which holds what seems to us to be the correct doctrine, viz., that the obligation whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent.

Where a principal engages an agent to do certain work and to take entire control over it, while the principal does not interfere, but leaves it entirely with the agent, the agent and not the principal will be liable to third parties for injuries or damages sustained by the negligence or unskilful manner in which the work was done.

Where the agent is at liberty to choose his own mode of action, then he is distinctively liable to damages, if by such mode of action he invades another's rights.

Our conclusion is that the complaint states a cause of action against the respondent.

3. Liability of Unauthorized Agent.

Kroeger v. Pitcairn. 101 Pa. St. 311.

Kroeger insured his merchandise with a company represented by Pitcairn. Pitcairn told him that the policy would not be avoided by storing a barrel of carbon oil on the premises, although the policy expressly provided against the storage of such material. After a loss occurred, the policy was in fact avoided on this ground and Kroeger sues Pitcairn upon his false representation.

Held, that an agent is responsible for any unjustified assumption of authority to act for his principal.

Sterrett, J.

If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not? The only difference is that in the latter the authority is self-assumed while in the former it is actual; but, that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds that authority delegated to him, he will be personally

liable to the person with whom he is dealing for or on account of his principal.

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, 1st, where the agent makes a false representation of his authority with intent to deceive; 2nd, where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and 3rd, where he undertakes to act bona fide believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubts as to the personal liability of the self-constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable. The agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural if not a necessary implication holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts bona fide, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such an assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it.

4. Liability of Unauthorized Public Agent.

Newman v. Sylvester. 42 Ind. 106.

Newman did work in grading Market Street in Indianapolis under a contract awarded him by the city. It later appeared that some of the work done was beyond the city limits, and payment was refused. Newman sues the Mayor and City Council on the theory that in letting the contract they acted as agents who had exceeded their authority and are hence personally liable.

Held, that a public agent who in good faith exceeds his authority is not personally liable.

Osborn, C. J.

It is said that if one undertakes to act as the agent for another, bona fide, believing that he has due authority, but in fact has not authority, and therefore acts under an innocent mistake, he is held by law to be equally as reprehensible as if he knew he had no authority. The reason given is that every person so acting for another,

by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act, and thereby draws the other into a reciprocal engagement; that the signature of the agent amounts to an affirmation that he has authority to do the particular act. "But circumstances may arise, in which the agent would not, or might not, be held to be personally liable, if he acted without authority, if that want of authority was known to both parties, or unknown to both parties." In all the cases when one acting as agent without authority has been held liable, it would be found that he had been guilty of some fraud, had made some statement which he knew to be false, or had stated as true what he did not know to be true, omitting at the same time to give such information to the other party as would enable him, equally with himself, to judge as to the authority under which he proposed to act.

One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he thus contracts to repose in his authority, that he may be liable. If he enter into the contract in the name and as the agent of another, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with, from such information or otherwise, is fully informed of the authority possessed or claimed by him, he is not liable on the ground of deceit or for misleading the other party. It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has a full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, and he fails to avail himself of such knowledge, or the means of knowledge reasonably accessible to him, he cannot say that he was misled simply on the ground that the party assumed to act as agent without authority in the absence of fraud.

If the party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party.

III.

UNDISCLOSED PRINCIPAL.

When the agent is acting for a principal whose name he does not disclose, this undisclosed principal is ordinarily liable to third persons to the same extent as is a disclosed principal. This is true even though the third person gives credit to the agent, supposing

him to be the principal. However, when the third person elects to regard the agent as the sole contracting party, as he may do, he cannot afterwards proceed against the principal. When a contract under seal is sealed by the agent in his own name, the principal is not liable, and in the case of negotiable instruments only those persons whose names appear on the paper may be held.

Ordinarily the undisclosed principal may bring an action in his own name against a third person who supposed that he was dealing with the agent as principal. Upon those types of contract, however, in which the principal is not liable to third persons, he himself cannot enforce rights against them. When the third party has refused to deal with the principal, when the contract between him and the agent involves elements of personal trust and confidence in the agent, or when the agent is party to a sealed instrument, or to a negotiable instrument, the agent alone may sue. Further, when the principal has made the agent the apparent owner of goods, he is estopped to set up his own title.

A. Liability of Undisclosed Principal.

1. In General.

Fradley v. Hyland. 37 Fed. 49.

Gibson, the manager of canal boats belonging to Hyland, incurred debts for supplies furnished by Fradley, who supposed that Gibson was the owner and gave him credit for the amount due. Upon the failure of Gibson, Fradley discovered that Hyland was the real principal, and now sues him.

Held, that an undisclosed principal may be sued unless the third party has looked exclusively to the agent, and the principal has settled his accounts with the agent.

Wallace, J.

The general rule is familiar that, when goods are bought by an agent who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification "that the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the act of payment or such a state of accounts would be an answer to the action brought by the seller, where he has

looked to the responsibility of the agent." The principal must respond to and may avail himself of a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. "He must take the contract subject to all equities, in the same way as if the agent were the sole principal," and accordingly subject to any right of set-off on the part of the seller. Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely coextensive as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases. The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities, was narrowed by the interpretation that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. While a correct interpretation of the rule of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. The principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent and knew of no one else. Under such circumstances, it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings, charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But as Gibson did not assume to act as agent in making the purchase, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit,

supposing him to be the only principal. In the first, if the agent has authority, express or implied, to buy upon credit for the principal, or ostensible authority to do so, upon which the seller relies, then by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special agent. When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent. It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has supplied him with funds to purchase for cash, to a seller who has sold to the person employed on credit, and dealt with him only as principal. Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit. So, also, in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's act. But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal can resort to and recover of him, if he has not *bona fide* paid

the agent in the meantime, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller.

2. Effect of Refusal to Deal with Principal.

Kayton v. Barnett. 116 N. Y. 625.

The plaintiffs sold Bishop several machines for \$4,500, of which \$3,000 was paid and the remainder unpaid. Bishop died without having paid the balance. The plaintiffs now sue the defendants on the ground that Bishop as their agent bought the property for them without disclosing his principal.

Held, that an undisclosed principal may be sued upon a contract made in his behalf by an agent, even after a refusal to deal with the principal.

Follett, C. J.

When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase-price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them he was buying for himself and not for them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiff's property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

3. Election to Hold Agent.

Lindquist v. Dickson. 98 Minn. 369.

Lindquist decorated and repaired a house belonging to Mrs. Dickson, under a contract made with Joseph M. Dickson, her husband, whom Lindquist supposed to be the real principal. Lindquist recovered a judgment against Dickson which was not paid, and now sues Mrs. Dickson. The defense is that having sued

the agent. the third party is not entitled to sue the undisclosed principal.

Held, that when the third party elects to regard the agent as the sole contracting party, he cannot afterwards sue the undisclosed principal, but securing a judgment is not necessarily such an election.

Start, C. J.

The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent, personally, and resort to the principal. But whether the creditor can proceed against the undiscovered principal, after he has obtained a judgment on his claim against the agent, is a question as to which the adjudged cases are conflicting.

The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undisclosed principal, he may upon the discovery of the principal resort to him or to the agent with whom he dealt at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. Nothing short of satisfaction of the judgment against the agent would discharge the principal. It is a question of election. Election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice.

We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent.

4. Suit upon Sealed Instrument.

Briggs v. Partridge. 64 N. Y. 357.

The plaintiffs entered into a sealed agreement with Hurlburt whereby they contracted to sell certain real estate to Hurlburt, who, unknown to the plaintiffs, was acting as agent for the defendants. Upon failure of Hurlburt to take a conveyance, the plaintiffs sue the defendants, who contend that only the agent of an undisclosed principal may be sued upon a contract sealed by him.

Held, that only the parties to a sealed instrument may be sued upon it.

Andrews, J.

The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent, in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity.

In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal, was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. This qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent.

We return, then, to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement.

The plaintiff's agreement in this case was with Hurlburt and not with the defendant. The plaintiff has recourse against Hurlburt on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evi-

dence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is "Where a contract is made by deed, under seal on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

5. Suit Upon Negotiable Instrument.

Manufacturers and Traders' Bank v. Love. 13 App. Div. (N. Y.) 561.

Johnston, who conducted a lumber business as agent for Mabel G. Love, the defendant, signed a note for lumber purchased in the course of the business, as "J. W. Johnston, Agent." This note was indorsed to the plaintiff, who sues the defendant upon it as an undisclosed principal.

Held, that only those persons whose names appear upon a negotiable paper may be sued upon it.

Ward, J.

Whatever may be the rule as to other contracts not under seal, the law is firmly established in this state as to commercial paper that persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It is also held that the negotiable instrument binds only the ostensible maker, though the word "agent" is attached to his signature; no principal being named in the body of the instrument or indicated by the signature. The law merchant surrounds the negotiable paper in the hands of a bona fide holder with a credit not given to other contracts, and protects him against hidden equities of which he has no notice, and permits him to recover against the party whose name is signed to the instrument, though there be attached to his name, the word "agent;" and he is not bound to search for a principal unknown to the instrument itself. Nor can he so do. The rights of the holder are confined to the parties to the instrument, and he must rely upon them alone, except that he can establish that the name used as the signature

to the instrument has been adopted by the assumed principal, or by the person **not** named in the instrument, as his own, in transacting the business. This may be done.

6. Effect of Disclosure of Principal in Negotiable Instrument.

Jump v. Sparling. 218 Mass. 324.

A note was signed as follows: "J. H. Sparling, Treas., Stratton Engine Company"; "David F. Burns, Pres., Stratton Engine Company." The signers intended that this should be a note of the Stratton Engine Company. Suit is brought by the trustee in bankruptcy of the payee against Sparling, who contends that the note is a note of the corporation, and not his own note.

Held, that under the Negotiable Instruments Act, an agent disclosing his principal is exempt from liability.

Rugg, C. J.

Under the law previous to the enactment of the Negotiable Instruments Act, the defendant corporation would not have been held on this note. It would have been not the note of the corporation, but simply the personal note of the two individuals who signed. A change in the law in this respect has been wrought by that act. "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." These words plainly imply that if the person signing a promissory note adds to his signature words describing himself as an agent or as occupying some representative position which at the same time discloses the name of the principal, he shall be exempted from personal liability, while, if he omits the name of the principal, although adding words of agency, he will be held liable personally and the words of agency will be treated simply as *descriptio personae*. In this respect the common law rule of this Commonwealth whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority, is abrogated. The agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal. Of course if one signs as agent when he is not, he is liable as principal.

7. Effect of Clothing Agent with Indicia of Ownership.

Nixon v. Brown. 57 N. H. 34.

Nixon employed Mason to buy a horse for him. Mason bought the horse, paid for it with Nixon's money, and took a bill of sale

in his own name. Afterwards, he informed Nixon of what he had done and showed him the bill of sale. Nixon permitted him to go away with the horse and bill of sale still in his possession. Mason then sold the horse to Brown, showing him the bill of sale, and absconded with the proceeds. Nixon sues to recover the value of the horse.

Held, that a principal who has invested his agent with indicia of ownership is bound by a sale made by that agent.

Ladd, J.

The general rule that the possession of goods by a bailee or servant gives him no power to make any disposition of them, except by virtue of actual authority received from the owner, is so well settled as to be quite elementary. But there are several exceptions to this rule, quite as well settled, and quite as well understood as the rule itself. One relates to money, bank bills, checks, and notes payable to the bearer or transferable by delivery. Another exception, in England, relates to sales in market overt. But as we have no markets overt in this State, that exception has no existence here. Another is where the possession of the bailee, from the nature of his employment, implies an authority to sell,—as, when goods are left with an auctioneer, or factor, a sale by such bailee though he had no actual authority, will bind the owner. The reason given for this last exception is that the owner has allowed the bailee in possession to hold out the appearance of an authority to sell, which would deceive and defraud the fair purchaser if the law allowed the validity of the sale to be questioned. This statement suggests the ground of my decision in this case. The facts, specially stated by the referee, show most clearly to my mind that the plaintiff allowed Mason, while he retained possession of the horse, to hold out the appearance of ownership in himself, and so of an authority to sell, which would deceive and defraud a fair purchaser if the law permitted the validity of the sale to be questioned.

8. Effect of Factor's Acts.

Foerderer v. Tradesmen's National Bank. 107 Fed. 219.

Jagode & Co. received from the Keen-Sutterle Company, for sale, a consignment of wool belonging to the plaintiff, and made advances to the Keen-Sutterle Company without notice that the latter was not the actual owner. They then shipped the wool to purchasers, but before delivery the defendant bank seized it under a claim arising out of the possession of certain warehouse receipts. Upon finding that its claim was not good, the bank retained the wool under an agreement with Jagode & Co. to pay the full value, with damages for the original taking. The plaintiff now sues the bank for the value of the wool.

Held, that under the factor's act, title passes to a person receiving a pledge of property from the factor.

Wallace, Cir. J.

Were it not for the factor's act of the state of Pennsylvania, it would be entirely clear that neither Jagode & Co. nor the defendant could be protected under any title derived from the Keen-Sutterle Company. A factor is an agent for the owner of the goods consigned, and must observe the instructions of his principal in respect to them, whether express or implied, and cannot deal with the property as his own. In the absence of instructions to the contrary, he is empowered to sell the goods of his principal according to the usage of the trade. Upon a sale made by the factor conformably to his authority, the principal is divested of his title in the goods, and the title passes to the purchaser. He has a lien upon the goods while they are in his possession for his advances and commissions, and upon the proceeds of the sale. He has no authority to use or pledge them for his own benefit, except for the purpose of reimbursing himself when the principal, after reasonable notice and demand, fails to repay his advances. He cannot ordinarily bind his principal by a disposition of the goods not made in the usual course of business. He must sell in the market where he transacts business. He cannot sell by way of barter. If he makes an unauthorized disposition of the goods, his lien is lost; and such a disposition of them does not transfer any right as against the principal, even to the extent of the lien. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and cannot be transferred by his tortious act in pledging the goods for his own gain.

As persons dealing with an agent are bound to take notice of the extent of his powers, a transfer of property by a factor not authorized by the powers delegated to him by the principal creates no right in the person dealing with him, as against the principal. It follows that innocent purchasers or pledgees, who, relying upon the *indicia* of title afforded by his possession of the goods, have dealt with the factor, supposing him to be the actual owner, acquire no title to the property where the transfer is unauthorized by the express or implied terms of the principal's instructions. Applying these rules to the present case, inasmuch as the Keen-Sutterle Company, the factor of the plaintiff, transcended its authority in consigning the wool upon advances to Jagode & Co., the latter, except for the provisions of the factor's act, would have acquired no title to the property as against the real owner, the plaintiff; and, as Jagode & Co. could not transfer a better title than they had themselves, the defendant could not have acquired any title to the wool through Jagode & Co. as against the plaintiff.

The factor's act of Pennsylvania is designed to remedy the hard-

ship of the common law whereby "factors authorized to sell the goods of their principal, and who are held out to the world as the owners thereof, have no power to pledge the goods in their possession for advances made by persons who have reason to believe that they are the actual owners." Unlike cognate legislation in some of the other states, the act does not purport to give validity to all contracts made by a factor in respect to the disposition of the goods with innocent third persons who advance money or negotiable instruments upon a deposit or pledge of the goods by the factor. The third section of the act provides as follows:

"Whenever a consignee or factor, having possession of merchandise, with authority to sell the same, shall dispose of or pledge such merchandise or any part thereof, with any person as a security for any money advanced or negotiable instrument given by him upon the faith thereof, such other person shall acquire by virtue of such contract the same interest in and authority over the said merchandise as he would have acquired thereby if such consignee or factor had been the actual owner thereof; provided, that such person shall not have notice by document or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise."

This statute, being in derogation of the common law, is to be strictly construed.

But, upon the most literal construction, the terms of the section protect a factor who has received from another factor a consignment of merchandise in the possession of the latter, and made advances thereon, without notice by document or otherwise that the consigning factor was not the actual owner. The factor thus receiving a consignment and making advances thereon acquires, by the explicit language of the section, the same "interest in and authority over" the merchandise as though the consigning factor were at the time its actual owner. Until his lien is satisfied he has the same right to sell or dispose of the merchandise that he would have had if it had been consigned to him by the actual owner, and any sale or transfer of it made by him conformably with a factor's duty to his principal will divest the title of the real owner. Unless he can sell the merchandise, his lien would be of no value, and the statute would be merely an illusory protection to him. The terms of the section apply to and control one transaction between the Keen-Sutterle Company and Jagode & Co. The Keen-Sutterle Company, being in possession of the wool, consigned it to Jagode & Co., and the latter made the advances without notice that the Keen-Sutterle Company was not the actual owner. Consequently Jagode & Co., by force of the statute, became entitled to deal with the wool exactly as though the Keen-Sutterle Company had been the owner, and had consigned it to them as its own factors.

We are of the opinion that the defendant acquired a valid title to the wool under the arrangement made by Jagode & Co. in the replevin suit.

B. Liability of Third Person to Undisclosed Principal.

1. General Rule.

Huntington v. Knox. 7 Cush. (Mass.) 371.

Huntington sold hemlock belonging to his wife, the plaintiff, to Knox, receiving a partial payment for which he gave a receipt indicating that the contract was between himself and Knox. Mrs. Huntington sues for the price. The defendant claims that only those parties whose names appear on a written contract may sue or be sued upon it.

Held, that an undisclosed principal may sue upon a written contract made by an agent.

Shaw, C. J.

It is now settled by authorities, that when the property of one is sold by another, as agent, if the principal gives notice to the purchaser before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds. But the courts mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the

contract, jointly with others, or alone, according to the interest. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence.

2. Right to Assert Debt Due from Agent.

Montagu v. Forwood. (1893) 2 Q. B. (Eng.) 350.

The plaintiffs employed Beyts & Craig, merchants in London, as brokers to collect insurance money due clients of the plaintiffs upon a loss incurred. Beyts & Craig employed the defendants, brokers at Lloyds, to collect the money for them, which the defendants did at a time when Beyts & Craig owed them a much larger amount. The defendants did not know that Beyts & Craig were acting as agents for an undisclosed principal and they applied the proceeds to the bill which Beyts & Craig owed them. The plaintiffs now sue to recover the amount of the collection.

Held, that a claim against an agent acting for an undisclosed principal may be set off against the claim of that principal.

Lord Esher, M. R.

Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled. The same principle applies to any one who is authorized to sell goods, or to receive money for his principal, when there is nothing to lead the person who deals with him to suppose, and he does not in fact know, that he is acting as an agent. When a person who sells goods is known by the purchaser to be a broker—that is, an agent—the case is entirely different: the purchaser cannot then set off a debt due to him from the broker against the demand of the principal.

Bowen, L. J.

The principle is not confined to the sale of goods. If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C., or employs C. as his agent, if B. is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as

if B. had in fact been a principal. If A. allowed his agent B. to appear in the character of a principal he must take the consequences. Here Beyts & Craig were allowed by the plaintiffs to deal with the defendants as if they had been dealing on their own account, and the defendants who dealt with Beyts & Craig are entitled to stand in the position in which they would have stood if Beyts & Craig had really been dealing as principals.

3. Exclusive Credit Given to Agent.

Moore v. Vulcanite Portland Cement Co. 121 App. Div. (N. Y.) 667.

The Vulcanite Portland Cement Company made a contract with Hedden & Sons whereby it agreed to sell them cement. After some question by the Vulcanite Company whether Hedden & Sons was the real principal, and after an answer by Hedden & Sons that it was the real principal, proceedings were instituted by the Vulcanite Company to recover for cement already shipped. Upon payment of this claim, Hedden & Sons demanded the remaining cement due under the contract, which the Vulcanite Company then refused to ship. This action is brought for breach of the contract to deliver the remainder by Moore, who contends that Hedden & Sons made the contract on behalf of himself and others as undisclosed principals.

Held, that when exclusive credit is given to an agent, the agent alone may sue.

Ingraham, J.

It is undoubtedly the well-settled general rule that "where an agent enters into a contract as though made for himself, and the existence of a principal is not disclosed, the principal may, as a general rule, enforce the contract." There are, however, exceptions to this general rule, as "where a personal trust or confidence is reposed by the other party in the agent who contracted in his own name;" and this is based upon another general principle, i. e., "Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract.'"

It seems to me that this presents an exception to the general rule that an undisclosed principal can enforce a contract made by [his] agent for [his] benefit, as presenting a case in which the vendor expressly refused to make a contract with any party except the one of its own selection, and is brought directly within the exception that the "principal also will be liable to be sued and be entitled

to sue thereon in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent."

There is a clear distinction between this case and a case where a party seeks to hold liable an undisclosed principal to whom he has sold goods through an agent and who has actually received the goods and applied them to his own use. It cannot be doubted but that the party to a contract who has discovered that the goods were sold to an undisclosed principal may waive his right to refuse to recognize any other party to the contract than the person with whom he has contracted and insist upon holding responsible the undisclosed principal. But an entirely different question is presented where the party to the contract refuses to recognize an undisclosed principal as a principal, and insists upon holding the party with whom he has contracted as the real party to the contract. The proposition is, that a party to a contract is entitled to insist that the parties with whom he contracted are the real parties who will perform and enforce the contract, and he is not bound to recognize either an actual assignment of the contract or, what is its equivalent, an enforcement of the contract by an undisclosed principal upon the ground that the contract was really made for his benefit.

4. Contract Involving Financial Responsibility of Agent.

Birmingham Matinee Club v. McCarty, 152 Ala. 571.

Agee, President of the Matinee Club, entered into a written contract to sell property belonging to the Club to the defendant, McCarty, and to give him a warranty deed. Agee was at this time acting as an agent of the Club, which was his undisclosed principal. McCarty refused to accept the property, and the Club sues for damages for the breach of the agreement.

Held, that when a third party enters into a contract with the agent of an undisclosed principal, involving the financial responsibility of the agent, the principal cannot sue upon it.

McClellan, J.

The vital and decisive question is, may an undisclosed principal enforce, in breach of performance, a contract made by an agent fully authorized thereunto, in his own name, for the sale to and purchase by another of lands of the principal wherein it is stipulated that the ostensible seller (the agent in reality) will grant by warranty deed an unincumbered title? As a general rule, the principal, though undisclosed, is invested by the authorized act of the agent, for the benefit and advantage of the principal, with every right and burdened with every liability arising out of or pertaining to the contract as perfectly as if the principal had, in his own name and person, made the contract. But this rule is subject to an important exception, viz., that if the contract involves elements of personal

trust and confidence, as a consideration moving from the agent (of the undisclosed principal), contracting in his own name, to the other party to the contract, the principal, while it remains executory, cannot, against the resistance of the other party, enforce it, either to compel performance by the other party or in damages for a breach. The reason for this exception is manifest. If the party contracting without knowledge of the agency were bound to take the service or conveyance of property from the undisclosed principal, the well-recognized rule that one may determine for himself with whom he will deal, with whom he will contract, would be directly infringed; and the elements of the contract reasonably attributable to personal confidence and trust, including the financial responsibility of the agent, with whom he alone deals as principal, would be stricken of force to which under all principles of substantial justice and right the relying party is entitled to the benefit. Of course, it follows that for a failure or refusal by the party dealing with the agent to perform the contract, which was in reality, but unknown to be, the undertaking of an undisclosed principal, and not the undertaking of the individual with whom made, the recalcitrant party cannot be mulcted in damages by the developed principal.

Applying this principal to the case at bar, the appellant is without right to and cannot recover; and the judgment to that effect was well rendered.

5. Right of Third Party to Withdraw from Executory Contract.

Pancoast v. Dinsmore. 105 Me. 471.

Mrs. Pancoast agreed to buy a farm which Dinsmore, as agent for Hilton, agreed to sell to her. Hilton was himself acting as agent for the real owner, Mrs. Coughlan. Mrs. Pancoast paid \$400 on the purchase price to Dinsmore, which she now seeks to recover without performing the contract.

Held, that when a contract is entirely executory, a person who has had dealings with an agent for an undisclosed principal, believing him to be the real principal, is entitled to withdraw.

Savage, J.

The position of the defendant is that the real owner, a Mrs. Coughlan, was an undisclosed principal, of whom Hilton was the agent, and that a tender of a deed by Mrs. Coughlan was as effectual to hold the plaintiff, as would have been a tender of a deed by Hilton, had the title been in him. But this conclusion does not follow. The plaintiff's contract was with Hilton as a principal. She contracted with no one else. Doubtless, if the owner had placed the title in Hilton for sale as agent, and he had performed his contract by the execution and delivery of a deed, by the principles of the law of

agency, the undisclosed owner might have held the plaintiff for the price. Doubtless, too, the plaintiff might have held the owner, as undisclosed principal, to the performance of the contract made by her agent. This rule is well settled. But this case does not fall within these rules. Here the defendant, instead of seeking to bind an undisclosed principal to a third party who contracted with the agent, seeks to bind a third party to an undisclosed principal, in the case of an unperformed contract.

It is good sense, as well as sound law, that in case of a purely executory contract, a party dealing with another as principal, though in fact he is agent, is not compellable, at all events, to accept performance from the undisclosed principal, when discovered, though he may do so. He may well say: "This is not the contract I made." In case an agent, in making a contract with a third party, acts in his own name, and does not disclose the name of his principal, or the existence of an agency, the agent becomes, as to that third party, the contracting party. And the third party may stand on the contract which he has made. "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract; he may contract with whom he pleases, and the sufficiency of his reasons for so doing cannot be inquired into." And were such reasons open to inquiry, it is easy to see that one might be willing to take the warranties of one person in a deed, when he would not take those of another. At any rate, he is only obliged to take the deed which he contracted to take. It follows that the plaintiff was not bound in law to accept Mrs. Coughlan's deed, when tendered.

IV.

TERMINATION OF AGENCY.

Termination of agency may be brought about:

1. By fulfilment of the contract or by agreement. Termination in this manner occurs when the purposes of the agency have been fulfilled, or when the time of its duration has elapsed.

2. By operation of law. The agency is destroyed by operation of law when the subject matter changes or is destroyed; when it becomes illegal; or when the parties become incompetent by death, bankruptcy or insanity.

3. By revocation. The principal may ordinarily revoke the agency, or the agent renounce it at will. This is true even though the revocation operates as a breach of the contract for which damages may be recovered. Only in the following cases is agency irrevocable:

- a. When the agent has a power coupled with an interest. In order that this exception shall exist, the agent must have an interest in the thing itself which constitutes the subject matter of the agency, as distinguished from a mere interest in the success of the agency.
- b. When the agent has a power coupled with a duty to a third person. If the agent has incurred a personal obligation to a third person on account of his agency, it may not be revoked until the agent is protected against loss or damage arising from that obligation.

i. Accomplishment of Purpose.

Rowe, Trustee v. Rand, Receiver. III Ind. 206.

Rowe was appointed receiver to take charge of the business of a company which was indebted to the First National Bank of Indianapolis, and to the Indiana Banking Company. He deposited the money he received with the Banking Company, under the name of William Rowe, Trustee. Subsequently, these two banks and the National Bank's successor entered into an adjustment of accounts between themselves and each signed a release to the other under which a settlement of all rights between them was effected. Rowe seeks to establish his right to the money deposited as trustee in an action against Rand, the receiver of the Banking Company, who contends that Rowe's authority as agent ceased when the two principals adjusted their respective rights against each other by mutual releases.

Held, that the agency was accomplished by the signing of the releases, and that Rowe's interest in the fund thereby ceased.

Niblack, J.

A trustee is one to whom an estate has been conveyed in trust, and, consequently, the holding of property in trust constitutes a person a trustee. An agent is one who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered. In the case of an ordinary agency for the sale or distribution of property, the title to the property, as well as to the proceeds, remains in the principal. Such an agency may be revoked at any time, in the discretion of the principal. It may, also, be in like manner terminated by the renunciation of the agent, he being liable only for the damages which may result to the principal. An agency may also be, and is, revoked by operation of law in certain cases, among which are the bankruptcy of the principal, the extinction of the subject matter of the agency, the loss of the principal's power over such subject matter, or the complete execution of the business for which the agency was created; also, where the changed condition becomes such

as to produce an incapacity in either party to proceed with the business of the agency. Where a power or authority to act as agents is conferred on two persons, the death of one of them terminates the agency. So, where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other can not proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked.

The inevitable inference from these legal propositions is that when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interest afterwards occurs, the severance revokes the agency.

An agent may sue in his own name: First, When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. Secondly. When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law, the real contracting party. Thirdly. When, by the usage of trade, he is authorized to act as owner, or as a principal contracting party, notwithstanding his well known position as agent only. But this right of an agent to bring an action, in certain cases, in his own name is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent.

Applying the general principles thus announced to the facts herein above stated, our conclusions are, that Rowe became an agent only, and hence not a trustee, for the sale of the property left with him by the banks; that he acquired no lien either upon the property or its proceeds which would have prevented the national banks, or either one of them, as the situation might have authorized at the time, from revoking Rowe's authority as their agent, and demanding an accounting from the banking company as to the money deposited with it by him, or from demanding such an accounting without revoking Rowe's agency; that consequently, the money so deposited constituted a fund upon which the national banks might have based a claim against the banking company when the agreement was mutually entered into on the 10th day of August, 1883, and that, if, in fact, all claim against that fund was released by the agreement of that date, the agency of Rowe in all matters concerning the fund was thereby revoked, leaving him in a position to demand only an accounting for his services and expenses.

2. Change in Subject Matter.

Cox v. Bowling. 54 Mo. App. 289.

Bowling authorized Cox to procure some one to purchase his house and lot for \$2,500. After the house was destroyed by fire,

Bowling effected a sale of the land for \$2,000 to Snyder, with whom Cox had been in negotiation before the fire. Cox now sues for the value of his services.

Held, that when the subject matter changes, the agency is terminated.

Gill, J.

Plaintiff did not secure a purchaser for the house and lot he engaged to sell. Snyder and Bowling were never able to agree on a price for the property as it stood when Cox conducted the negotiations. Bowling's price—and that, too, at which Cox undertook to sell—was \$2500, but Snyder was not willing to pay that for the property. Subsequently, however, when the building was destroyed and the property became materially changed (so that indeed it was not the same as when Cox was employed to sell it), Bowling and Snyder came together and a sale of the vacant lot was effected. But this was not the property that Cox was empowered to sell. There was nothing said between Bowling and Cox after the destruction of the building. So material a change in the subject matter of the agency amounted to a revocation of Cox's authority as agent. It is well settled that the authority of the agent is determined by the destruction of the subject matter of the agency.

3. Provision against Termination by Change in Subject Matter.

Turner v. Goldsmith. (1891) 1 Q. B. (Eng.) 544.

Goldsmith, a shirt manufacturer, agreed to employ Turner as a traveling salesman for the term of five years to sell goods as Goldsmith should forward samples. About two years thereafter, Goldsmith's factory burned down, and he refused to continue the employment of Turner. Turner sues for breach of contract.

Held, that while a change in the subject matter ordinarily terminates an agency, the contract may by its terms negative this assumption.

Lindley, L. J.

The company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. On the face of the agreement, there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell.

There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. But this rule is only

applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor. The substance is that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable.

Kay, L. J.

There is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement. If it had been proved that the defendant's power to carry on business had been taken away by something for which he was not responsible, I should say that there was no breach of the agreement, but here it was not taken away.

4. Death of Principal.

Weber v. Bridgman. 113 N. Y. 600.

Weber gave Hartwig a power of attorney authorizing him to discharge a mortgage. Hartwig discharged the mortgage, took the money for it, and absconded after learning that Weber was dead. This discharge was given to Bridgman, who had acquired title to the premises and who paid the mortgage. Mrs. Weber, as administratrix of Weber's estate, sues to foreclose the mortgage as an existing lien on the property.

Held, that death revokes an agency.

Danforth, J.

The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts

an end to the agency, and, therefore, is an instantaneous and unqualified revocation of the authority of the agent. There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where the agency is coupled with an interest, or where the principal was a firm and only one of its members died. But both cases recognize the general rule to be as above stated. It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England although now modified by statute, and is generally applied in this country.

5. Insanity of Principal.

Drew v. Nunn, L. R. 4 Q. B. D. (Eng.) 661.

Drew sold shoes to the wife of Nunn. Nunn had given his wife authority to buy goods on credit, but he later became insane. During his insanity his wife continued to buy from Drew, who did not know that Nunn was insane.

Held, that while insanity terminates an agency, ostensible authority given before insanity may still be relied upon.

Brett, L. J.

Upon this state of facts two questions arise. Does insanity put an end to the authority of the agent? One would expect to find that this question has been long decided on clear principles; but I find that no satisfactory conclusion has been arrived at. If such insanity as existed here did not put an end to the agent's authority, it would be clear that the plaintiff is entitled to succeed; but in my opinion insanity of this kind does put an end to the agent's authority. It cannot be disputed that some cases of change of status in the principal put an end to the authority of the agent; thus, the bankruptcy and death of the principal, the marriage of a female principal, all put an end to the authority of the agent. It may be argued that this result follows from the circumstance that a different principal is created. Upon bankruptcy the trustee becomes the principal; upon death the heir or devisee as to realty, the executor or administrator as to personalty; and upon the marriage of a female principal her husband takes her place. And it has been argued that by analogy the lunatic continues liable until a fresh principal, namely, his committee, is appointed. But I cannot think that this is the true ground, for executors are, at least in some instances, bound to carry out

the contracts entered into by their testators. I think that the satisfactory principle to be adopted is that, where such a change occurs as to the principal that he can no longer act for himself, the agent whom he has appointed can no longer act for him. In the present case a great change had occurred in the condition of the principal: he was so far afflicted with insanity as to be disabled from acting for himself; therefore his wife, who was his agent, could no longer act for him. Upon the ground which I have pointed out, I think that her authority was terminated. It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he had knowledge of his principal's incompetency to act.

The second question then arises, What is the consequence where a principal, who has held out another as his agent, subsequently becomes insane, and a third person deals with the agent without notice that the principal is a lunatic? Authority may be given to an agent in two ways. First, it may be given by some instrument, which of itself asserts that the authority is thereby created, such as a power of attorney; it is of itself an assertion by the principal that the agent may act for him. Secondly, an authority may also be created from the principal holding out the agent as entitled to act generally for him. The agency in the present case was created in the manner last mentioned as between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which this doctrine, which however seems to me to be the true principle, exists. It is said that the right to hold the insane principal liable depends upon contract. I have a difficulty in assenting to this. It has been said also that the right depends upon estoppel. I cannot see that an estoppel is created. But it has been said also that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that those representations are withdrawn. The authorities seem to base the right upon the ground of public policy; it is said in effect that the existence of the right goes in aid of public business. It is, however, a better way of stating the rule to say that the holding out of another person as agent is a representation upon which, at the time when it was made, third parties had a right to act, and if no insanity had supervened would still have had a right to act. In this case the wife was held out as agent, and the plaintiff acted upon the defendant's representation as to her authority without notice that it had been withdrawn. The defendant cannot escape from the consequences of the representation which he has made; he cannot withdraw the agent's authority as to third persons without giving them notice of the withdrawal. The principal is bound although he retracts the agent's authority, if he has not

given notice and the latter wrongfully enters into a contract upon his behalf. The defendant became insane and was unable to withdraw the authority which he had conferred upon his wife; he may be an innocent sufferer by her conduct, but the plaintiff, who dealt with her *bona fide*, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation which, as between the two, was the original cause of the mischief, must be the sufferer and must bear the loss. Here it does not lie in the defendant's mouth to say that the plaintiff shall be the sufferer.

A difficulty may arise in the application of a general principle such as this is. Suppose that a person makes a representation which after his death is acted upon by another in ignorance that his death has happened: in my view the estate of the deceased will be bound to make good any loss, which may have occurred through acting upon that representation.

6. Revocation of Agency.

Cloe v. Rogers. 31 Okla. 255.

Rogers gave Cloe an irrevocable agency, for a period of two years, to lay out and sell certain lots of land for him. Cloe opened an office, listed the lots, and did work with a view to selling them, when Rogers withdrew his authority. Cloe sues him for breach of agreement.

Held, that although a contract in its terms specifies that it is irrevocable, it may be revoked upon payment of damages.

Dunn, J.

It must be conceded that, before plaintiff acted, the contract was merely a proffer on the part of the defendant, and, so far as the same remained unacted on by plaintiff, was subject to revocation; that it was an offer to appoint plaintiff an agent, uncoupled with any interest whatsoever in plaintiff; and that, had revocation been made prior to any act on the part of plaintiff, defendant had the power and the right to revoke. [The question involved, however, it being undisputed that plaintiff accepted the proffer, opened an office at Grove, placed therein an agent, incurred considerable expense, and spent several months pursuing the business under the contract, is: Does this alter the relationship between the parties, and does it have the effect of giving to the plaintiff an actual, valuable interest in the contract, and supply the want of consideration and mutuality which existed prior thereto? In answer, we may say the general rule seems to be that, where an agency is uncoupled with an interest, it may be revoked by the principal at will, without liability for damages; but where it is for a fixed time, and contemplates on the part of the agent the expenditure of time and money

to carry it out, and is accepted and the duties imposed are entered upon by the agent, and money and time are expended in pursuance of the object of the agency, that, although the principal has the power to revoke and bring to a termination the contract, yet he lacks the right of so doing, except upon the burden of responding to the agent for such damages as he may suffer by reason thereof.

Where the authority is not coupled with an interest, the principal has power to revoke at his will at any time. But this power to revoke is not to be confounded with the right to revoke. Much uncertainty has crept into the text-books and decisions from a failure to discriminate clearly between them. Except in those cases where the authority is coupled with an interest, the law compels no man to employ another against his will. The relation of agent to his principal is founded, in greater or less degree, upon trust and confidence. It is essentially a personal relation. It is the rule of law that contracts of agency, like those creating other personal relations, will not be specifically enforced. Nor does it make any difference in this view that the principal has expressly agreed that he will continue to confide in the agent for a definite period. It is no less difficult on that account, to coerce compliance. The law, therefore, leaves the principal in such cases to determine for himself how long the relation shall continue. This, then, is what is meant when it is said that the principal may revoke the authority at any time. But it by no means follows that, though possessing this power, the principal has a right to exercise it without liability, regardless of his contract in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such agreement the principal is as much liable as for the breach of any contract. It is in this view, therefore, that the question of the right to revoke arises. When the right to revoke exists—when no express or implied agreement exists that the agent shall be retained for a definite time, the power and the right of revocation coincide—such employments are deemed to be at will merely, and may be terminated at any time by either party, without violating contract obligations or incurring liability. The law presumes that all general employments are thus at will merely, and the burden of proving employment for a definite time rests upon him who alleges it.

7. Irrevocable Agency: Power Coupled with Interest.

Hunt v. Rousmanier's Administrators. 8 Wheat. (U. S.) 174.

Rousmanier borrowed money from Hunt, giving him as security an irrevocable power of attorney authorizing him to sell certain vessels belonging to Rousmanier upon failure to pay the amount due. Rousmanier died insolvent without having paid the notes, and Hunt offered Rousmanier's interest in the vessels for

sale. This bill is brought to force Rousmanier's representatives to assent to the sale.

Held, that when an agency is coupled with an interest, it is irrevocable.

Marshall, C. J.

The general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.

As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, a power coupled with an interest? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing.

The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences and, therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being created in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

8. Irrevocable Agency: Power Coupled with Duty.

Hess v. Rau. 95 N. Y. 359.

The plaintiffs, stock brokers, sold stock short for Rau, and borrowed the stock to make delivery for him. While the transaction was pending, Rau died and the plaintiffs continued to protect the account. After the defendant had been appointed administratrix of the estate, the plaintiffs required additional margin which was not forthcoming; they thereupon bought in the stock and charged Rau's estate. They now seek to recover the losses thereby incurred. The defense is that the plaintiff's agency was revoked by the death of Rau and that the plaintiffs should have covered the stock immediately upon learning of his death.

Held, that when an agency is coupled with an obligation to a third person, death does not revoke the agency.

Andrews, J.

It is unnecessary to explain the nature of a short sale of stock, or to restate the practical methods adopted to accomplish the purpose of the seller who usually has nothing to sell, but wants to realize a profit by selling something he has not got at the price of to-day, and buying it in at a lower price to-morrow. It is sufficient for the present purpose to say that the broker employed in the transaction borrows the stock to make delivery on his own account as between himself and the lender, and repeats the process of borrowing so long as the transaction with his customer is open and as the exigency requires. The broker and the customer have mutual and correlative rights and duties. The former undertakes to carry the stock a reasonable time so as to afford the customer an opportunity to realize the expected profits, while the customer on his part is bound to keep his margin good so as to secure the broker against loss. But the customer is entitled to notice before the broker can close him out by buying in the stock on his account.

It is clear that after the death of Rau, the plaintiffs could not enter into fresh transactions in the purchase or sale of stocks on account of Rau or his estate, in execution of unexecuted orders or a general authority to deal in stocks for his account given before his death. But the rule that the death of a principal revokes the authority of an agent has a well-settled exception when the agency is coupled with an interest. The death of Rau left the plaintiffs in the position they had previously occupied, of being borrowers of the stocks to deliver, with a personal liability to replace them when called for by the lenders. This obligation was not and could not be terminated by Rau's death. The estate of Rau on the other hand was bound to indemnify the plaintiffs for any loss they might sustain on closing out the transactions, or as the phrase is, "covering the sale."

Until the appointment of a representative of Rau's estate there was no one on whom the plaintiffs could call for additional margin or to close the transactions, and no one to give directions in its behalf. The result of continuing the transaction might be favorable or unfavorable, but which, could not be foreseen. We think the plaintiffs were authorized, acting in good faith, to maintain the existing situation until a representative of the estate should be appointed. They had such an interest in the transaction by reason of the personal obligation they had assumed, as entitled them to continue it until that time.

END OF VOLUME ONE

TABLE OF CASES

Acme Coal Company v. Northrup National Bank. 23	
Wyo. 66	II, 40
Adams v. Messinger. 147 Mass. 185	I, 399
Adams v. Power. 48 Miss. 450	I, 233
Adams v. Wright. 14 Wis. 408	II, 114
Aiken v. Blaisdell. 41 Vt. 655	I, 156
Alabama Great Southern Railroad Company v. McKen-	
zie. 139 Ga. 410	I, 385
Aldrich v. Ames. 9 Gray (Mass.) 76	I, 44
Allen v. Elmore. 121 Ia. 241	I, 331
Allen Grocery Co. v. Bank of Buchanan County. 192	
Mo. App. 476	II, 34
American Live Stock Commission Co. v. The Chicago	
Live Stock Exchange. 143 Ill. 210	II, 325
American Railway-Frog Co. v. Haven. 101 Mass. 398 ..	II, 360
American Sales Book Co. v. Whitaker, 100 Ark. 360 ..	I, 455
Anchor Electric Co. v. Hawkes. 171 Mass. 101	I, 169
Anderson v. Wisconsin Central Railway Company. 107	
Minn. 296	I, 340
Angus v. Downs. 85 Wash. 75	II, 31
Arkansas Valley Smelting Co. v. Belden Mining Co. 127	
U. S. 379	I, 184
Arnold v. Clifford. 2 Sumner (C.C.U.S.) 238	I, 153
Arnold v. Delano. 4 Cush. (Mass.) 33	I, 365
Arnold v. North American Chemical Co. 232 Mass. 196	I, 279
Askew v. Silman. 95 Ga. 678	II, 255
Atherton v. Newhall. 123 Mass. 141	I, 302
Atlanta & Walworth Butter & Cheese Association v.	
Smith. 141 Wis. 377	II, 301
Atlantic Dock Co. v. Leavitt. 54 N.Y. 35	I, 37
Atlantic & North Carolina Railroad Co. v. Atlantic and	
North Carolina Co. 147 N.C. 368	I, 180
Atwood v. Fiske. 101 Mass. 363	I, 152
Austin v. Burge. 156 Mo. App. 286	I, 16
Bacon v. Christian. 184 Ind. 517	II, 166
Bacon v. Parker. 137 Mass. 309	I, 56
Bagby & Rivers Company v. Rivers. 87 Md. 400	II, 259
Baldwin v. Canfield. 26 Minn. 43	II, 352

Bank of Batavia v. New York, Lake Erie and Western Railroad Co. 106 N.Y. 195	I, 429
Bank of Houston v. Day. 145 Mo. App. 410	II, 22
Bank of Montpelier v. Montpelier Lumber Co. 16 Ida. 730	II, 108
Barclay v. Barrie. 209 N.Y. 40	II, 232
Barnard v. Campbell. 55 N.Y. 456	I, 352
Barnard v. Kellogg. 10 Wall. (U.S.) 383	I, 324
Bartlett v. Robinson. 39 N.Y. 187	II, 113
Barwick v. English Joint Stock Bank. L.R. 2 Ex. Cas. (Eng.) 259	I, 461
Bassenhorst v. Wilby. 45 Oh. St. 333	II, 68
Bath Gas Light Co. v. Claffy. 151 N.Y. 24	II, 308
Beach v. Palisade Realty & Amusement Co. 86 N.J.L. 238	II, 365
Beck & Pauli Lithographing Co. v. Colorado Milling and Elevator Co. 52 Fed. 700	I, 215
Beecher v. Bush. 45 Mich. 188	II, 175
Beedy v. Braman Wooden Ware Co. 108 Me. 200	I, 300
Behn v. Burness. 3 B. & S. (Eng.) 751	I, 127
Bensel v. Anderson. 85 N.J.E. 391	I, 148
Bentley v. Doggett. 51 Wis. 224	I, 430
Bergen v. Trimble. 130 Md. 559	II, 91
Bergh v. Warner. 47 Minn. 250	I, 438
Bessenger v. Wenzel. 161 Mich. 61	II, 107
Bethell & Co. v. Clark & Co. L.R. 20 Q.B.D. (Eng.) 615	I, 376
Bibb v. Allen. 149 U.S. 481	I, 442
Billings's Appeal. 106 Pa. 558	I, 191
Bird v. Munroe. 66 Me. 337	I, 293
Birmingham Matinee Club v. McCarty. 152 Ala. 571	I, 491
Blackburn Bobbin Co., Ltd. v. Allen & Sons, Ltd. (1918) 1 K.B. (Eng.) 540	I, 258
Blackwell v. Kercheval. 27 Ida. 537	I, 80
Boomer v. Wilbur. 176 Mass. 482	I, 467
Boston & Colorado Smelting Co. v. Smith, 13 R.I. 27 ...	II, 173
Boston Foundry Company v. Whiteman. 31 R.I. 88 ...	II, 213
Boston Glass Manufactory v. Langdon. 24 Pick. (Mass.) 49	II, 375
Boston Ice Co. v. Potter. 123 Mass. 28	I, 12
Bowditch v. Jackson Co. 76 N.H. 351	II, 377
Bowditch v. New England Mutual Life Insurance Co. 141 Mass. 292	I, 155
Boyden v. Boyden. 9 Mete. (Mass.) 519	I, 95
Bradbury v. The Boston Canoe Club. 153 Mass. 77	II, 299

Braddock, Wm., Jr. v. The Philadelphia, Marlton & Medford Railroad Co. 45 N.J.L. 363	II, 342
Brady v. Equitable Trust Co. 178 Ky. 693	I, 59
Brauer v. Shaw. 168 Mass. 198	I, 21
Breed v. Judd. 1 Gray (Mass.) 455	I, 91
Brewer v. The Boston Theater. 104 Mass. 378	II, 355
Brice v. Bannister. L.R. 3 Q.B.D. (Eng.) 569	I, 187
Bridgers v. Staton, 150 N.C. 216	II, 358
Briggs v. Partridge. 64 N.Y. 357	I, 481
Bright v. Offield. 81 Wash. 442	II, 10
Brittain v. Westall. 137 N.C. 30	I, 456
Broadnax v. Ledbetter. 100 Tex. 375	I, 16
Brock v. Clark. 60 Vt. 551	I, 398
Bronson's Executor v. Chappell. 12 Wall. (U.S.) 681 ..	I, 428
Brooks v. Cooper. 50 N.J.E. 761	I, 164
Brooks v. White. 2 Metc. (Mass.) 283	I, 64
Brown v. Whipple. 58 N.H. 229	I, 295
Brown v. Winona & St. Peter Railroad Company. 27 Minn. 162	I, 444
Bryant's Pond Steam Mill Co. v. Felt. 87 Me. 234 ...	II, 331
Buie v. Kennedy. 164 N.C. 290	II, 178
Bullard v. Bell. 1 Mason (C.C.U.S.) 243	II, 28
Burgan v. Lyell. 2 Mich. 102	II, 202
Burnley v. Tufts. 66 Miss. 48	I, 349
Butler v. Gleason. 214 Mass. 248	I, 130
Butler Paper Co. v. Cleveland. 220 Ill. 128	II, 291
Butler Savings Bank v. Osborne. 159 Pa. St. 10	II, 183
Butterfield v. Byron. 153 Mass. 517	I, 260
Button v. Hoffman. 61 Wis. 20	II, 274
Cabeen v. Campbell. 30 Pa. St. 254	I, 375
Caldwell v. Wentworth. 14 N.H. 431	I, 248
Cape Charles Bank v. Farmers Mutual Exchange. 120 Va. 771	II, 132
Capen v. Barrows. 1 Gray (Mass.) 376	I, 197
Capital National Bank v. American Exchange National Bank. 51 Neb. 707	II, 102
Capwell v. Machon. 21 R.I. 520	II, 55
Carlill v. The Carbolic Smoke Ball Co. (1893) 1 Q.B. (Eng.) 256	I, 26
Carter v. Phillips. 144 Mass. 100	I, 217
Cayuga County Bank v. Warden. 1 N.Y. 413	II, 111
Central Transportation Co. v. Pullman's Palace Car Co. 139 U.S. 24	II, 310
Central Trust Co. v. Bridges. 57 Fed. 753	I, 409

Central Trust Co. v. Chicago Auditorium Association. 240 U.S. 581	I, 253
Challiss v. McCrum. 22 Kas. 157	II, 78
Charlestown Boot & Shoe Co. v. Dunsmore. 60 N.H. 85 .	II, 349
Cherokee National Bank v. Union Trust Company. 33 Okla. 342	II, 76
Chicopee Bank v. Philadelphia Bank. 8 Wall. (U.S.) 641	II, 96
Clements v. Jessup. 36 N.J.E. 569	II, 190
Clews v. Friedman. 182 Mass. 555	II, 328
Cloe v. Rogers. 31 Okla. 255	I, 500
Codd v. Rathbone. 19 N.Y. 37	II, 281
Collender v. Dinsmore. 55 N.Y. 200	I, 204
Collins v. Blantern. 2 Wil. (Eng.) 341	I, 40
Collyer v. Moulton. 9 R.I. 90	I, 231
Columbian Banking Company v. Bowen. 134 Wis. 218	II, 90
Commercial Bank of Selma v. Hurt. 99 Ala. 130	I, 346
Conahan v. Fisher. 233 Mass. 234	I, 205
Cone v. Russell. 48 N.J.E. 208	II, 357
Consterdine v. Moore. 65 Neb. 291	II, 53
Cooke v. Millard. 65 N.Y. 352	I, 290
Copeland v. Burk. 59 Okla. 219	II, 56
Cota v. Buck. 7 Metc. (Mass.) 588	II, 8
Couch v. Waring. 9 Conn. 261	II, 130
Coursolle v. Weyerhauser. 69 Minn. 328	I, 100
Cover v. Myers. 75 Md. 406	II, 70
Cox v. Bowling. 54 Mo. App. 289	I, 495
Cox v. Hickman. 8 H.L. Cas. (Eng.) 268	II, 172
Cox v. National Bank of New York. 100 U.S. 704	II, 94
Cox v. Willoughby. L.R. 13 Ch. D. (Eng.) 863	II, 235
Crandall v. Willig. 166 Ill. 233	I, 41
Crane v. Gruenewald. 120 N.Y. 274	I, 432
Cranson v. Goss. 107 Mass. 439	I, 157
Cummings v. Arnold. 3 Metc. (Mass.) 486	I, 239
Curtis v. Davidson. 215 N.Y. 395	II, 79
Cutter v. Powell. 6 T.R. (Eng.) 320	I, 226
Daly & Sons, Inc. v. The New Haven Hotel Co. 91 Conn. 280	I, 242
Davis v. Davis. (1894) 1 Ch. (Eng.) 393	II, 177
Davis v. Howell. 33 N.J.E. 72	II, 237
Davis v. Patrick. 141 U.S. 479	I, 47
Davis Sulphur Ore Co. v. Atlanta Guano Co. 109 Ga. 607	I, 386
Davison v. Holden. 55 Conn. 103	I, 408
Dawe v. Morris. 149 Mass. 188	I, 132
Day v. Caton. 119 Mass. 513	I, 11
Daylight Burner Co. v. Odlin. 51 N.H. 56	I, 451

Deardorff v. Foresman. 24 Ind. 481	II, 36
DeCicco v. Schweizer. 221 N.Y. 431	I, 74
Delaware Bank v. Jarvis. 20 N.Y. 226	II, 78
Dennistoun & Company v. Stewart. 17 How. (U. S.) 606. II, 143	
Denver Fire Insurance Co. v. McClelland. 9 Col. 11 ...	II, 306
Desmarais v. Taft. 210 Mass. 560	I, 55
Diem v. Koblitz. 49 Ohio St. 41	I, 227; I, 382
Dillaby v. Wilcox. 60 Conn. 71	I, 42
Doggett, Ex'x. v. Dill. 108 Ill. 560	II, 240
Donohue v. Woodbury. 6 Cush. (Mass.) 148	I, 68
Douglas v. Shumway. 13 Gray (Mass.). 498	I, 371
Dow v. Worthen. 37 Vt. 108	I, 305
Doyle v. Dixon. 97 Mass. 208	I, 52
Drake v. Fairmont Drain Tile & Brick Co. 129 Minn. 145	I, 129
Drake v. Wells. 11 Allen (Mass.) 141	I, 51
Drew v. Nunn. L.R. 4 Q.B.D. (Eng.) 661	I, 498
Driscoll v. Towle. 181 Mass. 416	I, 466
Drummond & Sons v. Van Ingen & Co. 12 A.C. (Eng.)	
284	I, 321
Dudley v. Kentucky High-School. 9 Bush. (Ky.) 576 .	II, 344
Dunbar v. Tyler. 44 Miss. 1	II, 105
Duncan v. The New York Mutual Insurance Co. 138	
N.Y. 88	I, 118
Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.	
L.R. (1915) A.C. (Eng.) 847	I, 177
Dwinel v. Stone. 30 Me. 384	II, 167
Dyer v. Clark. 5 Metc. (Mass.) 562	II, 246
East Birmingham Land Co. v. Dennis. 85 Ala. 565	II, 326
Eastern Expanded Metal Co. v. Webb Granite and Con-	
struction Co. 195 Mass. 356	I, 171
Eastman v. Clark. 53 N.H. 276	II, 169
Easton National Bank v. The American Brick & Tile Co.	
70 N.J.E. 732	II, 340
Edgington v. Fitzmaurice. L.R. 29 Ch. D. (Eng.) 459	I, 133
Edmunds v. Merchants' Despatch Transportation Co.	
135 Mass. 283	I, 116
Eliason v. Henshaw. 4 Wheat. (U.S.) 225	I, 29
Ellerman v. The Chicago Junction Railways & Union	
Stockyards Company. 49 N.J.E. 219	II, 354
Elliott v. Horne. 10 Ala. 348	I, 90
Emerson v. Durand, Executor. 64 Wis. 111	II, 219
Emerson v. Senter. 118 U.S. 3	II, 252
Erdman v. The Trustees of the Eutaw Methodist Prot-	
estant Church. 129 Md. 595	II, 211

Exchange Bank of St. Louis v. Rice. 107 Mass. 37.....	I, 82
Exchange National Bank of Pittsburgh v. Third National Bank of New York. 112 U.S. 276	I, 448
Farina v. Fickus. L.R. (1900) 1 Ch. (Eng.) 331	I, 19
Farmers National Bank of Annapolis v. Venner. 192 Mass. 531	II, 86
Farnsworth v. Burdick. 94 Kas. 749	II, 50
Farnsworth v. Hemmer. 1 Allen (Mass.) 494	I, 447
Farquharson Brothers & Co. v. King & Co. (1902) A.C. (Eng.) 325	I, 358
Fidelity Trust Company v. Whitehead. 165 N.C. 74 ...	II, 67
Finley v. Smith. 165 Ky. 445	II, 9
First National Bank of Hutchinson, Kansas v. Lightner. 74 Kas. 736	II, 16
First National Bank of McClusky v. Meyer. 30 N. Dak. 388	II, 125
First National Bank of North Bennington v. Town of Mt. Tabor. 52 Vt. 87	I, 407
Fisher Hydraulic Stone and Machinery Co. v. Warner. 233 Fed. 527	I, 392
Fitzgerald v. Allen. 128 Mass. 232	I, 236
Fletcher v. Peck. 6 Cranch (U.S.) 87	I, 13
Foerderer v. Tradesmen's National Bank. 107 Fed. 219 .	I, 485
Foster's Admr. v. Metcalfe. 144 Ky. 385	II, 49
Francis v. McNeal. 228 U.S. 695	II, 239
Fradley v. Hyland. 37 Fed. 49	I, 477
Franklin National Bank v. Roberts Brothers Company. 168 N.C. 473	II, 42
Freeman v. Robinson. 38 N.J.L. 383	I, 77
Friendship Telephone Co. v. Newark Telephone Co. 88 N.J.E. 562	II, 378
Frost v. Gage. 3 Allen (Mass.) 560	I, 168
Frye v. Burdick. 67 Me. 408	I, 284
Furbish v. Goodnow. 98 Mass. 296	I, 48
Galigher v. Jones. 129 U.S. 193	I, 395
Galusha v. Sherman. 105 Wis. 263	I, 141
Gardner v. Gardner. 5 Cush. (Mass.) 483	I, 411
Gardner v. Lane. 12 Allen (Mass.) 39	I, 272
Garfield v. Paris. 96 U.S. 557	I, 303
Gates v. Beecher. 60 N.Y. 518	II, 93; II, 250
Gay v. Rooke. 151 Mass. 115	II, 7
Genet v. The Delaware and Hudson Canal Co. 136 N.Y. 593	I, 213
Gibbs's Estate, Hallstead's Appeal. 157 Pa. St. 59	II, 286

Gillet v. Bank of America. 160 N.Y. 549	I, 209
Gillis v. Cobe. 177 Mass. 584	I, 245
Gilpin v. Savage. 201 N.Y. 167	II, 100
Goodnow v. Empire Lumber Co. 31 Minn. 468	I, 96
Goodspeed v. The East Haddam Bank. 22 Conn. 530 ..	II, 314
Goodwin v. Robarts. L.R. 10 Ex. 337	II, 4
Gordon v. Levine. 194 Mass. 418	II, 86
Goshen National Bank v. Bingham. 118 N.Y. 349	I, 188
Gould v. Bourgeois. 51 N.J.L. 361	I, 310
Gower v. Moore. 25 Me. 16	II, 92
Grafton v. Cummings. 99 U.S. 100	I, 54
Grant v. Beard. 50 N.H. 129	I, 418
Graves v. Johnson. 156 Mass. 211	I, 174
Gray v. Gardner. 17 Mass. 187	I, 235
Gregory v. Lee. 64 Conn. 407	I, 88
Griffith v. Charlotte R. R. Co. 23 S.C. 25	I, 276
Griswold v. Eastman. 51 Minn. 189	I, 38
Groth v. Kersting. 23 Col. 213	II, 260
Groves v. Groves. 65 Oh. St. 442	I, 60
Gruen v. Ohl & Co. 81 N.J.L. 626	I, 388
Gwilliam v. Twist. (1895) 2 Q.B. (Eng.) 84.....	I, 437
H. B. Claflin Co. v. Evans. 55 Oh. St. 183	II, 208
Hackley v. Headley. 45 Mich. 569	I, 145
Hagan v. Scottish Insurance Company. 186 U.S. 423 ..	I, 212
Hale v. Gerrish. 8 N.H. 374	I, 98
Haluptzok v. Great Northern Railway Co. 55 Minn. 446	I, 463
Hanover National Bank v. Blake. 142 N.Y. 404	I, 167
Harkness v. Russell. 118 U.S. 663	I, 285
Harrison v. Nicollet National Bank of Minneapolis. 41 Minn. 488	II, 146
Hart v. Woodruff. 24 Hun (N.Y.) 510.....	II, 253
Hartshorn v. Day. 19 How. (U.S.) 211.....	I, 39
Hartwig v. Rushing. 93 Ore. 6	I, 289
Haskell v. Avery. 181 Mass. 106	II, 60
Hatch v. Taylor. 10 N.H. 538	I, 434
Haven v. Foster. 9 Pick. (Mass.) 111.....	I, 124
Hawes v. Smith. 12 Me. 429	I, 200
Hayden v. Charter Oak Driving Park. 63 Conn. 142 ..	I, 354
Hayes v. City of Nashville. 80 Fed. 641	I, 389
Hayward v. Leonard. 7 Pick. (Mass.) 180	I, 244
Hearns v. Waterbury Hospital. 66 Conn. 98	I, 470
Heart v. East Tennessee Brewing Company. 121 Tenn. 69	I, 262
Heath v. Stoddard. 91 Me. 499	I, 433

Heinemann v. Heard. 50 N.Y. 27	I, 446
Hendren v. Wing. 60 Ark. 561	II, 197
Henry v. Heeb. 114 Ind. 275	I, 426
Hermann v. Charlesworth. (1905) 2 K.B. (Eng.) 123 .	I, 173
Herring v. Skaggs. 62 Ala. 180	I, 452
Herrington v. Davitt. 220 N.Y. 162	I, 78
Hess v. Rau. 95 N.Y. 359	I, 503
Heurtematte v. Morris. 101 N.Y. 63	II, 75
Heyn v. O'Hagen. 60 Mich. 150	I, 416
Hibbard, Spencer & Bartlett v. Peek. 75 Wis. 619.....	I, 453
Higbie v. Rust. 211 Ill. 333	I, 75
Higgins v. Moore. 34 N.Y. 417	I, 453
Highway Commissioners v. The City of Bloomington. 253 Ill. 164	I, 10
Hinnen v. Newman. 35 Kas. 709	I, 154
Hirth v. Graham. 50 Oh. St. 57	I, 50
Hoare v. Cazenove. 16 East (Eng.) 391	II, 144
Hodge v. Smith. 130 Wis. 326	II, 62
Hodges v. Shuler. 22 N.Y. 114	II, 18
Hodges v. Wilkinson. 111 N.C. 56	I, 312
Hoffman v. American Exchange National Bank. 2 Neb. (Unoff.) 217	II, 156
Hoffman v. Planters National Bank. 99 Va. 480	II, 127
Holbrook v. Lackey. 13 Metc. (Mass.) 132	II, 250
Homer Ramsdell Transportation Co. v. La Compagnie Générale Transatlantique. 182 U.S. 406	I, 467
Hooker v. The Midland Steel Co. 215 Ill. 444	II, 369
Hope v. The Valley City Salt Co. 25 W. Va. 789	II, 280
Hopkins v. Cowen. 90 Md. 152	I, 343
Houlditch v. Desanges. 2 Starkie (Eng.) 337	I, 372
Hovey v. Hobson. 53 Me. 451	I, 106
Howard v. Daly. 61 N.Y. 362	I, 443
Howe v. Newmarch. 12 Allen (Mass.) 49	I, 462
Hoyt v. Thompson's Executor. 19 N.Y. 207	II, 350
Hughes v. Gross. 166 Mass. 61	II, 234
Hull v. Ruggles. 56 N.Y. 424	I, 162
Hun v. Cary. 82 N.Y. 65	II, 366
Hunt & Co. v. Benson. 2 Humph. (Tenn.) 459	II, 191
Hunt v. Rousmanier's Administrators. 8 Wheat. (U.S.) 174	I, 501
Hunter v. Anthony. 53 N.C. 385	I, 208
Huntington v. Knox. 7 Cush. (Mass.) 371	I, 488
Hurff v. Hires. 40 N.J.L. 581	I, 333
Hutchinson v. Nay. 187 Mass. 262	II, 257

Imperial Building Co. v. The Chicago Open Board of Trade. 238 Ill. 100	II, 289
Ingraham v. Union Railroad Company. 19 R.I. 356	I, 307
In re C. B. Comstock & Co. 3 Sawyer (C.C.U.S.) 218 ..	II, 292
In re Estate Philpott. 169 Ia. 555	II, 65
In re E. W. A., a Debtor. (1901) 2 K.B. (Eng.) 642 ..	I, 196
In re Wright. 157 Fed. 544	I, 192
Inter-State Grocer Co. v. Bentley Co. 214 Mass. 227 ..	I, 317
Ireland v. The Palestine, etc., Turnpike Co. 19 Oh. St. 369	II, 339
Irwin v. Williar. 110 U.S. 499	I, 160
Jackson Bank v. Durfey. 72 Miss. 971	II, 241
Jackson Paper Manufacturing Co. v. Commercial National Bank. 199 Ill. 151	I, 458
Jacobs v. Day. 25 N.Y.S. 763	I, 318
Jacobus v. Jamestown Mantel Co. 211 N.Y. 154	II, 372
James v. City of Newton. 142 Mass. 366	I, 186
Jefferson Bank of St. Louis v. Chapman-White-Lyons Co. 122 Tenn. 415	II, 61
Jennings v. Dunham. 60 Mo. App. 635	I, 304
Jerman v. Edwards. 29 App. (D.C.) 535	II, 56
Johnson v. Credit Lyonnais Co. L.R. 3 C.P.D. (Eng.) 32	I, 356
Johnson v. Dodge. 17 Ill. 433	I, 410
Johnson v. Eveleth. 93 Me. 306	I, 373
Johnson v. Jackson. 130 Ky. 751	II, 261
Johnson v. Northwestern Mutual Life Insurance Co. 56 Minn. 365	I, 92
Johnson v. Wingfield. 42 S.W. (Tenn. Ch. App.) 203 .	II, 215
Johnson and Bedford v. Mitchell. 50 Tex. 212	II, 54
Johnston v. Bent. 93 Ala. 161	I, 126
Johnston & Co. v. Dutton's Adm'r. 27 Ala. 245	II, 200
Jones v. Earl. 37 Cal. 630	I, 373
Jones v. Newport News and Mississippi Valley Co. 65 Fed. 736	I, 214
Jones v. Padgett. L.R. 24 Q.B.D. (Eng.) 650	I, 322
Jordan v. Dobbins' Adm. 122 Mass. 168	I, 22
Jump v. Sparling. 218 Mass. 324	I, 484
Karrick v. Hannaman. 168 U.S. 328	II, 227
Kayton v. Barnett. 116 N.Y. 625	I, 480
Keighley v. Durant. (1901) A.C. (Eng.) 240	I, 414
Keightley v. Watson. L.R. 3 Ex. Rep. (Eng.) 716	I, 193
Kellogg Bridge Co. v. Hamilton. 110 U.S. 108	I, 314
Kelly v. Newburyport Horse Railroad Co. 141 Mass. 496	I, 422
Kennedy v. Panama, etc., Royal Mail Co. L.R. 2 Q.B. Cas. (Eng.) 580	I, 119
Kentucky Block Cannel Coal Co. v. Sewell. 249 Fed. 840 .	II, 194

Kerfoot v. The Farmers' & Merchants' Bank, 218 U.S. 281	II, 305
Kershaw v. Ladd. 34 Ore. 375	II, 157
Kilday v. Schancupp. 91 Conn. 29	I, 55
Kilgore v. Rich. 83 Me. 305	I, 89
Kimball, The. 3 Wall. (U.S.) 37	I, 247
Kimberly v. Patchin. 19 N.Y. 330	I, 332
King v. Crowell. 61 Me. 244	II, 97
King v. Moore. 72 Ark. 469	II, 223
Kingan & Co., Ltd. v. Silver. 13 Ind. App. 80	I, 404
Kingman & Co. v. Western Mfg. Co. 92 Fed. 486	I, 393
Kingman v. Spurr. 7 Pick. (Mass.) 235	II, 218
Kline Bros. & Co. v. Royal Insurance Co., Ltd. 192 Fed. 378	I, 425
Korkemas v. Macksoud. 131 App. Div. (N.Y.) 728	II, 126
Kroeger v. Pitcairn. 101 Pa. St. 311	I, 474
Kuser v. Wright. 52 N.J.E. 825	II, 352
Kyle v. Kavanagh. 103 Mass. 356	I, 114
Lafin and Rand Powder Company v. Burkhardt. 97 U.S. 110	I, 282
Lamkin & Foster v. LeDoux. 101 Me. 581	I, 99
Land Grant Railway & Trust Co. v. The Board of County Commissioners of Coffey County. 6 Kas. 245	II, 295
Latta v. Kilbourn. 150 U.S. 524	II, 217
Law v. Redditch. (1892) 1 Q.B. (Eng.) 127	I, 254
Lawrence v. Miller. 16 N.Y. 235	II, 111
Leavitt v. Fiberloid Company. 196 Mass. 440	I, 396
Leggett v. Hyde. 58 N.Y. 272	II, 170
Leserman v. Bernheimer. 113 N.Y. 39	II, 262
Lewenstein v. Forman. 223 Mass. 325	II, 41
Lewis, Hubbard & Co. v. Morton, 80 W. Va. 137	II, 140
Lill v. Gleason. 92 Kas. 754	II, 136
Lindquist v. Dickson. 98 Minn. 369	I, 480
Lindsay v. Smith. 78 N.C. 328	I, 171
Lingham v. Eggleston. 27 Mich. 324	I, 326
Linick v. Nutting & Co. 140 App. Div. (N.Y.) 265	II, 32
Linn v. Horton. 17 Wis. 151	II, 118
Linthicum v. Bagby. 131 Md. 644	II, 119
Litchfield v. Hutchinson. 117 Mass. 195	I, 135
Lloyd v. Grace, Smith, & Co. (1912) A.C. (Eng.) 716	I, 462
Lloyd v. Scott. 4 Peters (U.S.) 205	I, 163
Lobdell v. Baker. 3 Metc. (Mass.) 469	II, 76
London Joint Stock Bank, Limited v. Macmillan and Arthur. (1918) A.C. (Eng.) 777	II, 152
Long v. Hartwell, Administrator. 34 N.J.L. 116	I, 411

Lorah v. Nissley. 156 Pa. St. 329	I, 36
Lord v. Hull. 178 N.Y. 9	II, 222
Lord v. Parker. 3 Allen (Mass.) 127	I, 109
Loring v. City of Boston. 7 Metc. (Mass.) 409	I, 24
Lorymer v. Smith. 1 B. & C. (Eng.) 1	I, 320
Loud v. Pomona Land and Water Co. 153 U.S. 564	I, 224
Lough v. John Davis & Co. 30 Wash. 204	I, 472
Low v. Pew. 108 Mass. 347	I, 329
Lowenstein v. Lombard, Ayres & Co. 164 N.Y. 324 ...	I, 457
Lucas v. The Western Union Tel. Co. 131 Ia. 669	I, 30
Luthy v. Ream. 270 Ill. 170	II, 359
Mabardy v. McHugh. 202 Mass. 148	I, 137
Madden v. Electric Light Co. 181 Pa. 617	II, 296
Madison Ave. Baptist Church v. The Baptist Church in Oliver St. 46 N.Y. 131	I, 278
Mallory v. Gillett. 21 N.Y. 412	I, 43
Manufacturers and Traders' Bank v. Love. 13 App. Div. (N.Y.) 561	I, 483
Marcus v. McFarland. 119 Md. 269	II, 193
Margraf v. Muir. 57 N.Y. 155	I, 63
Marsh v. Wheeler. 77 Conn. 449	II, 205
Martlett v. Jackman. 3 Allen (Mass.) 287	II, 230
Mattison v. Marks. 31 Mich. 421	II, 18
Mausert v. Feigenspan. 68 N.J.E. 671	II, 371
Mayer v. McCreery. 119 N.Y. 434	I, 18
McArthur v. Times Printing Company. 48 Minn. 319 ..	I, 421
McCarter v. Firemen's Insurance Co. 74 N.J.E. 372 ...	II, 284
McCarthy v. Bowling Green Storage & Van Co. 182 App. Div. (N.Y.) 18	I, 105
McCarthy v. Hughes. 36 R.I. 66	I, 471
McCarthy v. Timmins. 178 Mass. 378	I, 465
McClenathan v. Davis. 243 Ill. 87	II, 15
McClure v. Law. 161 N.Y. 78	II, 368
McCormack v. Williams. 88 N.J.L. 170	II, 37
McCormick v. Shea. 99 N.Y.S. 467	II, 129
McCracken v. City of San Francisco. 16 Cal. 591	I, 415
McCreery v. Day. 119 N.Y. 1	I, 238
McElwee v. Metropolitan Lumber Co. 69 Fed. 302	I, 367
McGill v. Chillhowee Lumber Company. 111 Tenn. 552 .	I, 379
McIntyre v. Park. 11 Gray (Mass.) 102	I, 420
MacLean v. Dunn. 4 Bing. (Eng.) 722	I, 419
McLeod v. Hunter. 61 N.Y.S. 73	II, 21
McNeal v. Braun. 53 N.J.L. 617	I, 339
Mechanics' Bank of the City of New York v. Straiton. 3 Keyes (N.Y.) 365	II, 30

Meehan v. Valentine. 145 U.S. 611	II, 181
Meigs v. Dexter. 172 Mass. 217	I, 102
Memphis & Charleston Railroad Co. v. Woods. 88 Ala. 630	II, 361
Menagh v. Whitwell. 52 N.Y. 146	II, 242
Merchants' National Bank of Cincinnati v. Bangs. 102 Mass. 291	I, 342
Meriden Britannia Co. v. Zingsen. 48 N.Y. 247	I, 46
Miles v. Schmidt. 168 Mass. 339	I, 166
Miller v. Farmers' Milling & Elevator Co. 78 Neb. 441..	II, 326
Miller v. Marks. 46 Ut. 257	II, 70
Milliken v. Skillings. 89 Me. 180	I, 391
Mills v. Wyman. 3 Pick. (Mass.) 207	I, 13
Minneapolis & St. Louis Railway v. Columbus Rolling Mill. 119 U.S. 149	I, 32
Mitchell v. Inhabitants of Albion. 81 Me. 482	II, 126
Mollwo, March & Co. v. The Court of Wards. L.R. 4 P.C. (Eng.) 419	II, 179
Montagu v. Forwood. (1893) 2 Q.B. (Eng.) 350	I, 489
Moore v. Detroit Locomotive Works. 14 Mich. 266	I, 72
Moore v. Lowrey. 25 Ia. 336	I, 187
Moore v. Vulcanite Portland Cement Co. 121 App. Div. (N.Y.) 667	I, 490
Morgan v. Lewis. 46 Oh. St. 1	II, 303
Morrison v. The Austin State Bank. 213 Ill. 472	II, 188
Morse v. Wheeler. 4 Allen (Mass.) 570	I, 97
Morse v. Woodworth. 155 Mass. 233	I, 144
Moulton v. Kershaw. 59 Wis. 316	I, 17
Murray v. Thompson. 136 Tenn. 118	II, 44
Murrill v. Neill. 8 How. (U.S.) 414	II, 238
National Bank v. Watsontown Bank. 105 U.S. 217	II, 324
National Bank of Commerce v. Bossemeyer. 101 Neb. 96	II, 58
National Copper Bank v. Davis County Bank. 47 Ut. 236	II, 122
National Park Bank v. Saitta. 127 App. Div. (N.Y.) 624	II, 139
Newhall v. Central Pacific Railroad Co. 51 Cal. 345	I, 378
Newman v. Sylvester. 42 Ind. 106	I, 475
Nichol v. Godts. 10 Ex. Rep. (Eng.) 191	I, 316
Nicoll v. The New York & Erie Railroad Co. 12 N.Y. 121	II, 305
Nims v. Mount Hermon Boys' School. 160 Mass. 177 ..	II, 315
Nixon v. Brown. 57 N.H. 34	I, 484
Norrington v. Wright. 115 U.S. 188	I, 222
Northern Supply Co. v. Wangard. 117 Wis. 624	I, 313
O'Brien v. Boland. 166 Mass. 481	I, 23

O'Conner Mining & Manufacturing Co. v. Coosa Furnace Co. 95 Ala. 614	II, 363
O'Neill v. Supreme Council, American Legion of Honor. 70 N.J.L. 410	I, 251
Offenstein v. Weygandt. 89 Kas. 739	II, 52
Ogden v. Ogden. 1 Bland (Md.) 284	I, 49
Oregon Pacific Railroad Co. v. Forrest. 128 N.Y. 83 ..	I, 146
Page v. Citizens Banking Co. 111 Ga. 73	II, 212
Page v. Trufant. 2 Mass. 159	I, 61
Paine v. Brown. 37 N.Y. 228	I, 218
Pancoast v. Dinsmore. 105 Me. 471	I, 492
Parker v. Russell. 133 Mass. 74	I, 252
Parrot v. Mexican Central Railway Co. 207 Mass. 184 ..	I, 71
Pease v. Cole. 53 Conn. 53	II, 204
Pender v. Lushington. L.R. 6 Ch. D. (Eng.) 70	II, 356
People v. Lewinger. 252 Ill. 332	II, 39
People v. The Pullman's Palace Car Co. 175 Ill. 125 ...	II, 272
People ex rel. The New York Institution for the Blind v. Fitch. 154 N.Y. 14	II, 285
People ex rel. The Union Trust Co. v. Coleman. 126 N.Y. 433	II, 321
People ex rel. Winchester v. Coleman. 133 N.Y. 279....	II, 275
People's Bank v. Franklin Bank. 88 Tenn. 299	II, 154
People's State Bank v. Miller. 185 Mich. 565	II, 64
Peoria Insurance Company v. Botto. 47 Ill. 516	I, 237
Person & Riegel Co. v. Lipps. 219 Pa. 99.....	II, 322
Persons v. Oldfield. 101 Miss. 110	II, 210
Phelps v. Stocking. 21 Neb. 443	II, 117
Phelps v. Weber. 84 N.J.L. 630	II, 43
Phillips v. Phillips. 49 Ill. 437	II, 165
Phillips's Estate. No. 3. 205 Pa. 515	I, 189
Piaggio v. Somerville. 119 Miss. 6	I, 256
Pickering v. Busk. 15 East (Eng.) 38	I, 355
Pierce v. Cate. 12 Cush. (Mass.) 190	II, 87
Pierson & Pierson v. Hooker. 3 Johns. (N.Y.) 68	II, 207
Poel v. Brunswick-Balke-Collender Co. 216 N.Y. 310 ..	I, 31
Pollock v. Cohen. 32 Oh. St. 514	I, 424
Pool v. The City of Boston. 5 Cush. (Mass.) 219	I, 70
Pooley v. Driver. L.R. 5 Ch. D. (Eng.) 458.....	II, 162
Presbyterian Church v. Cooper. 112 N.Y. 517	I, 84
Public Bank of New York City v. Burchard. 135 Minn. 171	II, 128
Putnam v. Misochi. 189 Mass. 421	I, 198
Race v. Hansen. 12 Ill. App. 605	I, 348
Rand v. Nutter. 56 Me. 339	I, 195

Randall v. Hazelton. 12 Allen (Mass.) 412	I, 138
Randall v. Newson. L.R. 2 Q.B.D. (Eng.) 102	I, 323
Ray v. Thompson. 12 Cush. (Mass.) 281	I, 228
Redding v. Vogt. 140 N.C. 562	I, 232
Reggio v. Warren. 207 Mass. 525	I, 123
Reigart v. Manufacturers Coal and Coke Company. 217 Mo. 142	I, 296
Rice v. Nixon. 97 Ind. 97	I, 283
Richards v. Northwestern Coal & Mining Co. 221 Mo. 149	II, 379
Riley v. Mallory. 33 Conn. 201	I, 86
Roberts v. Banse. 78 N.J.L. 57	I, 68
Roberts v. Ely. 113 N.Y. 128	I, 179
Robinson v. Daughtry. 171 N.C. 200	II, 206
Robinson v. Reynolds. 1 Aikens (Vt.) 174	I, 108
Rodgers v. Clement. 162 N.Y. 422	II, 220
Rodgers v. Phillips. 40 N.Y. 519	I, 298
Rodijkheit v. Andrews. 74 Oh. St. 104	I, 183
Roscorla v. Thomas. 3 Q.B. (Eng.) 234	I, 76
Rosenbaum v. Hazard. 233 Pa. 206	II, 150
Rosenstein v. Burns. 41 Fed. 841	II, 233
Rowe, Trustee v. Rand, Receiver. 111 Ind. 206	I, 494
Rowell v. Rowell, Adm. 122 Wis. 1	II, 197
Rowley v. Bigelow. 12 Pick. (Mass.) 306	I, 140
Rummell v. Blanchard. 216 N.Y. 348	I, 369
Rupley v. Daggett. 74 Ill. 351	I, 115
Russell v. Easterbrook. 71 Conn. 50	II, 329
Sabine v. Paine. 223 N.Y. 401	II, 72
St. Clair v. Rutledge. 115 Wis. 583	II, 373
St. Louis, etc., Railroad Co. v. Terre Haute, etc., Railroad Co. 145 U.S. 393	II, 312
St. Martin and Co. v. Thrasher. 40 Vt. 460	II, 209
Salinas & Son v. Ellis. 26 S.C. 337	I, 249
Salt Lake City Brewing Co. v. Hawke & Andrews. 24 Ut. 199	II, 203
Salt Springs National Bank v. Burton. 58 N.Y. 430	II, 101
Saltus & Saltus v. Everett. 20 Wend. (N.Y.) 267	I, 349
Samstag and Hilder Brothers v. Ottenheimer. 90 Conn. 475	II, 164
Sawyer v. Long. 86 Me. 541	I, 330
Sceva v. True. 53 N.H. 627	I, 102
Schnell v. Nell. 17 Ind. 29	I, 61
Scovill v. Thayer. 105 U.S. 143	II, 343
Scudder v. Worster. 11 Cush. (Mass.) 573	I, 335
Seaver v. Phelps. 11 Pick. (Mass.) 304	I, 104

Seaver v. Ransom. 224 N.Y. 233	I, 81
Second National Bank of Mechanicsburg v. Graham. 246 Pa. 256	II, 133
Seufert v. Gille. 230 Mo. 453	II, 228
Shaw v. Railroad Company. 101 U.S. 557	I, 345
Shea v. Parker. 234 Mass. 592	II, 336
Sherrod v. Mayo, Adm. 156 N.C. 144.	II, 247
Shindler v. Houston. 1 N.Y. 261	I, 301
Shoninger v. Peabody. 57 Conn. 42	I, 423
Shuey v. United States. 92 U.S. 73	I, 23
Siler, Adm'r. v. Gray, Adm'r. 86 N.C. 566	I, 266
Silsbee v. Webber. 171 Mass. 378	I, 143
Silver v. Graves. 210 Mass. 26	I, 63
Simpson v. Del Hoyo. 94 N.Y. 189.	I, 359
Simpson v. Prudential Insurance Co. 184 Mass. 348 ...	I, 94
Sisson v. Donnelly. 36 N.J.L. 432	I, 201
Slayton v. Barry. 175 Mass. 513	I, 101
Smathers & Co. v. Toxaway Hotel Co. 162 N.C. 346 ..	II, 67
Smilie v. Stevens. 39 Vt. 315	II, 13
Smith v. Brady. 17 N.Y. 173	I, 241
Smith v. Hurd. 12 Metc. (Mass.) 371	II, 335
Smith v. Poillon. 87 N.Y. 590	II, 118
Smith v. Western Union Telegraph Co. 84 Ky. 664	I, 161
Smith v. Wheatcroft, L.R. 9 Ch. D. (Eng.) 223	I, 116
Snyder v. Corn Exchange National Bank. 221 Pa. 599 .	II, 29
Society Perun v. Cleveland. 43 Oh. St. 481	II, 288
Southern Development Co. v. Silva. 125 U.S. 247	I, 131
Spring v. Slayden-Kirksey Woolen Mills. 106 Ill. App. 579	I, 319
Spurgeon v. Smitha. 114 Ind. 453	II, 131
Stanton v. Westover. 101 N.Y. 265	II, 244
State v. Atlantic City & Shore Railroad Co. 77 N.J.L. 465	II, 299
State v. Dawson. 16 Ind. 40	II, 273
State of Maine v. Chandler. 79 Me. 172	I, 194
Stephenson v. Dickson. 24 Pa. St. 148	II, 123
Stevens v. Androscoggin Water Power Co. 62 Me. 498 .	II, 142
Stevens v. Perry. 113 Mass. 380	II, 214
Stevens v. The Rutland & Burlington Railroad Co. 29 Vt. 545	II, 345
Stevenson & Sons, Ltd. v. Aktien-Gesellschaft für Cartonnagen-Industrie. (1916) 1 K.B. (Eng.) 763 .	II, 231
Stewart v. Wyoming Cattle Rancho Co. 128 U.S. 383 .	I, 134
Stokes v. Continental Trust Co. 186 N.Y. 285	II, 332

Strong v. The Grand Trunk Railroad Company. 15 Mich. 206	I, 207
Studdy v. Beesty & Higgins. 60 L. T. Rep. (N.S.) (Eng.) 647	II, 121
Summers v. Mills. 21 Tex. 77	I, 275
Sunshine Cloak and Suit Co. v. Roquette Bros. 30 N. Dak. 143	I, 225
Swenson Brothers Co. v. Commercial State Bank. 98 Neb. 702	II, 149
Swift & Company v. Miller. 62 Ind. App. 312	II, 88
Swift v. Pierce. 13 Allen (Mass.) 136	I, 45
Taft v. Schwamb. 80 Ill. 289	II, 192
Tayloe v. The Merchants' Fire Insurance Co. 9 How. (U.S.) 390	I, 28
Taylor v. Barton Child Co. 228 Mass. 126	I, 182
Taylor & Farley Organ Co. v. Starkey. 59 N.H. 142 ..	I, 455
Tennant v. Dunlop. 97 Va. 234	II, 248
Terre Haute & Indianapolis Railroad Company v. McMurray. 98 Ind. 358	I, 435
Thayer v. Goss. 91 Wis. 90	II, 254
Thayer v. Humphrey. 91 Wis. 276	II, 236
Thomas v. Atherton. L.R. 10 Ch. D. (Eng.) 185	II, 221
Thomas v. Dakin. 22 Wend. (N.Y.) 9	II, 271
Thompson v. Sloan. 23 Wend. (N.Y.) 71	II, 20
Thorne v. Deas. 4 Johns. (N.Y.) 84	I, 450
Times Square Automobile Company v. Rutherford National Bank. 77 N.J.L. 649	II, 151
Tisher v. Beckwith. 30 Wis. 55	I, 37
Topliff v. Topliff. 122 U.S. 121	I, 211
Town of Essex v. Day. 52 Conn. 483	I, 121
Trenholm v. Miles. 102 Miss. 835	I, 287
Triphonoff v. Sweeney. 65 Ore. 299	II, 21
Trustees of Carrick Academy v. Clark. 112 Tenn. 483 ...	II, 282
Trustees of Dartmouth College v. Woodward. 4 Wheat. (U.S.) 518	II, 269
Trustees of the Free Schools in Andover v. Flint. 13 Metc. (Mass.) 539	II, 338
Tupper v. Cadwell. 12 Metc. (Mass.) 559	I, 87
Turner v. Goldsmith. (1891) 1 Q.B. (Eng.) 544	I, 496
Union Stock-Yards and Transit Co. v. Western Land and Cattle Co., Ltd. 59 Fed. 49	I, 280
United States v. John Kelso Co. 86 Fed. 304	II, 317
United States Steel Corporation v. Hodge. 64 N.J.E. 807	II, 370
Valbert v. Valbert. 282 Ill. 415	I, 147

Van Brocklen v. Smeallie. 140 N.Y. 70	I, 381
Van Buskirk v. State Bank of Rocky Ford. 35 Col. 142.	II, 147
Varney v. Ditmars. 217 N.Y. 223	I, 20
Vaughan v. Porter. 16 Vt. 267.....	I, 203
Vawter v. Griffin. 40 Ind. 593.....	I, 277
Visalia & Tulare Railroad Co. v. Hyde. 110 Cal. 632 ...	II, 330
Voris v. Schoonover. 91 Kas. 530	II, 27
Vulcan Metals Co. v. Simmons Mfg. Co. 248 Fed. 853...	I, 308
Walker v. Stetson. 14 Oh. St. 89	II, 115
Walti v. Gaba. 160 Cal. 324.....	I, 274
Warner v. Texas & Pacific Railway Co. 164 U.S. 418 ...	I, 52
Weber v. Bridgman. 113 N.Y. 600	I, 497
Weld v. Cutler. 2 Gray (Mass.) 195	I, 336
Wells v. Cook. 16 Oh. St. 67.....	I, 136
Welsh v. The Village of Rutland. 56 Vt. 228.....	I, 468
Westinghouse Electric and Manufacturing Co. v. Hodge. 181 Mo. App. 232.....	II, 123
Wettlaufer v. Baxter. 137 Ky. 362	II, 24
Wheatley v. Strobe and Wilcoxson. 12 Cal. 92	II, 45
Wheaton Building and Lumber Co. v. City of Boston. 204 Mass. 218.....	I, 114
Whitcomb v. Converse. 119 Mass. 38.....	II, 264
Whitcomb v. The National Exchange Bank of Baltimore. 123 Md. 612.....	II, 134
White v. Corlies. 46 N.Y. 467	I, 25
White v. Duggan. 140 Mass. 18.....	I, 412
White v. Kuntz. 107 N.Y. 518	I, 69
Whiteford v. Burckmyer. 1 Gill (Md.) 127	II, 116
Whiteside v. United States. 93 U.S. 247	I, 460
Whittaker Chain Tread Co. v. Standard Auto Supply Co. 216 Mass. 204.....	I, 66
Wigton v. Bowley. 130 Mass. 252	I, 338
Wilbour v. Hawkins. 38 R.I. 116	II, 38
Williams v. Johnson. 208 Mass. 544.....	II, 297
Wilson v. Hendee. 74 N.J.L. 640	II, 80
Wilson v. Senier. 14 Wis. 380	II, 103
Wilson v. Wilson. 26 Ore. 251.....	II, 224
Wisner v. The First National Bank of Gallitzin. 220 Pa. 21	II, 148
Witbeck v. Waine. 16 N.Y. 532	I, 264
Woburn National Bank v. Woods. 77 N.H. 172	I, 112
Wolke v. Kulne. 109 Ind. 313.....	II, 74
Wollenweber v. Ketterlinus. 17 Pa. St. 389.....	II, 121
Wood v. Boynton. 64 Wis. 265.....	I, 122
Wood v. Macafee. 172 N.Y.S. 703	II, 256

Wood v. Pugh, Gano & Lee. 7 Oh. 501.....	II, 145
Wood v. Steele. 6 Wall. (U.S.) 80	I, 265
Woodward-Holmes Co. v. Nudd. 58 Minn. 236.....	II, 195
Wooten v. Walters. 110 N.C. 251	I, 220
Zavelo v. Reeves. 227 U.S. 625	I, 267
Zimmerle v. Childers. 67 Ore. 465.....	I, 288

STATUTES

Mass. Acts and Resolves, 1908, c. 237, § 19.....	I, 360
Mass. Acts and Resolves, 1908, c. 237, § 20.....	I, 361
Mass. Acts and Resolves, 1908, c. 237, §§ 33-38.....	I, 362
Mass. Acts and Resolves, 1908, c. 237, § 60.....	I, 382
Mass. R.L. c. 73, §§ 77, 78, 82, 83.....	II, 73
Mass. R.L. c. 73, §§ 89-93, 99.....	II, 85
Mass. R.L. c. 73, §§ 113, 120, 121, 124, 125, 130-132.....	II, 109
Laws of New York, 1919, c. 408, Art. 2, § 11.....	II, 183
Laws of New York, 1919, c. 408, Art. 3, § 20.....	II, 211
Laws of New York, 1919, c. 408, Art. 6, § 62.....	II, 233
Laws of New York, 1919, c. 408, Art. 6, § 71.....	II, 265
Mass. Acts and Resolves, 1903, c. 437, §§ 7-12.....	II, 277
Mass. Acts and Resolves, 1903, c. 437, § 4.....	II, 318
Mass. Acts and Resolves, 1903, c. 437, § 14.....	II, 332
Mass. Acts and Resolves, 1903, c. 437, §§ 33-35.....	II, 347
Mass. Acts and Resolves, 1903, c. 437, § 40.....	II, 365
Mass. Acts and Resolves, 1903, c. 437, §§ 51-54.....	II, 380

GLOSSARY

A

- abatement*, n. a reduction; *plea in abatement*, a pleading by the defendant setting forth matters of fact showing the writ or declaration to be defective or incorrect.
- ab initio*, Lat. phr. from the beginning.
- abrogate*, v. to abolish, repeal or destroy.
- ad infinitum*, Lat. phr. without limit.
- adjudication*, n. the giving of a judgment in a cause; also the judgment given.
- administrator*, n. a man appointed by the probate court to manage the estate of a deceased person, generally in the absence of testamentary disposition. fem., *administratrix*.
- admiralty*, n. that body of law administered in maritime affairs.
- ad valorem*, Lat. phr. according to value.
- æquali jure*, Lat. phr. with equal right.
- affidavit*, n. sworn statement.
- agister (or)*, n. one who takes animals to pasture for hire.
- allegation*, n. an assertion by a party to an action in his pleading therein.
- alter ego*, Lat. phr. other self.
- ancillary*, adj. auxiliary; aiding.
- animadversion*, n. censure.
- anomalous*, adj. unusual; not conforming to rule.
- antecedent*, n. that which goes before. adj. foregoing.
- a posteriori*, Lat. phr. proceeding by induction from the effect to the cause.
- apparent*, adj. obvious.
- appellant*, n. that party who takes an appeal from a judgment.
- appellate court*, n. phr. court by which appeals are heard.
- appellee*, n. that party against whom an appeal from a judgment is taken.
- a priori*, Lat. phr. proceeding by deduction from the cause to the effect.
- assets*, n. property applicable to the payment of obligations.
- assignee*, n. one to whom an assignment is made.
- assignment*, n. an act or instrument of transfer.
- assignor*, n. one who makes an assignment.

- assumpsit*, Lat. an action at law brought upon a promise not under seal.
assured, n. or v. insured.
autonomous, adj. self-governing.
aver, v. to allege.
avermment, n. allegation.
avoidance, n. annulment by evasion.

B

- bailee*, n. party to whom personal property is delivered under a contract of bailment.
bailor, n. party who delivers personal property under a contract of bailment.
bailment, n. delivery of personal property to another for the execution of a special object or purpose.
bankrupt, n. one by or against whom a petition in bankruptcy has been filed; a person, generally insolvent, whose financial condition makes him liable to action by his creditors for the seizure and distribution among them of his property.
bankruptcy, n. the state or condition of one who is bankrupt.
barter, n. a contract by which parties exchange goods or commodities for other goods or commodities.
beneficiary, n. person entitled to the enjoyment of property of which another has the legal possession.
bilateral (contract), adj. a contract in which the obligation exists on both sides.
bill of lading, n. plur. the written evidence of a contract for the carriage or delivery of goods, issued by the carrier.
book account, n. plur. a statement of debits and credits between contracting parties, kept in a book.
bond, n. an instrument under seal conditioned upon the performance of or forbearance from an act.
breach (of contract), n. failure to fulfill the obligations of a contract.
brief, n. a summary of arguments and authorities presented to the court by counsel in the hearing of a case.
broker, n. an agent employed to make a bargain between buyer and seller.
by-laws, n. regulations adopted by a corporation or municipality for its government.

C

- canon*, n. a law or ordinance, generally of the church.
capital (of corporation), n. the aggregate of the sum subscribed

or paid in by shareholders to be used in the business of a corporation, as increased or decreased by subsequent operations.

capital stock, n. phr. that sum of money raised by subscriptions of stockholders of a corporation, or other property of a corporation, which is represented by shares.

casus, Lat. n. event or outcome; case.

casus faderis, Lat. phr. contingency contemplated by an agreement.

cestui que trust, Lat. phr. the owner of a beneficial interest in property, legal title to which is in another.

chattel, n. article of personal property.

chose in action, n. phr. right to recover possession or damages by legal process; right to enforce a claim or demand by legal process.

civil law, n. phr. the Roman law and its derivatives.

civiliter mortuus, Lat. phr. dead in contemplation of the law.

claimant, n. person who makes a claim.

codicil, n. instrument supplementing the terms of a will.

coerce, v. compel.

coeval, adj. contemporaneous.

collateral, adj. existing side by side.

comity, n. deference with which one jurisdiction treats the acts of another.

common law, n. phr. that body of unwritten law which has its source in usages and customs of immemorial antiquity.

composition (with creditors), n. agreement between a debtor and his creditors for the discharge of their claims, generally at less than their face value.

concur, v. to agree.

concurrent, adj. co-existing; running along with.

conjunctive, adj. serving to unite.

consideration (of contract). the benefit to the promisor or the detriment to the promisee which gives binding force to the contract.

consign, v. to deliver goods to a carrier to be transported to a named individual.

consignee, n. one to whom goods are consigned.

consignment, n. act of consigning goods; also used to indicate the goods consigned.

consignor, n. one who consigns goods.

contravention, n. violation.

conversion, n. unauthorized act of dominion over personal property of another.

- conveyance*, n. an instrument under seal by which an estate in land is created.
- copartnership*, n. partnership.
- corporate*, adj. pertaining to a corporation.
- corpus*, Lat. n. body.
- co-surety*, n. joint surety.
- court of chancery*, n. phr. court of equity.
- court of equity*, n. phr. court administering the law of equity, as distinguished from the common law.
- covenant*, n. a promissory warranty contained in a sealed instrument.
- covert*, adj. protected; term used to describe the status of a married woman.
- coverture*, n. the status of a married woman.
- crassa negligentia*, Lat. phr. gross negligence.
- cum onere*, Lat. phr. with the burden.
- cumulative voting*, n. phr. system of voting by which the elector, having a number of votes equal to the number of officers to be chosen, is allowed to use all his votes for one person, or to distribute them as he sees fit.
- curtesy*, n. that life estate in lands of his late wife to which a surviving husband is entitled by the common law. The right formerly existed only in event that children were born of the marriage.

D

- damages*, n. pecuniary compensation for injury or loss.
- damnum absque injuria*, Lat. phr. wrong for which there is no legal redress. Literally, loss without legal injury.
- debitum*, Lat. n. debt; something owed.
- deceit*, n. technically, an action of tort for a fraudulent misrepresentation.
- declaration of trust*, n. phr. act or instrument whereby a trust is created.
- deed*, n. instrument by which one person conveys an interest in land to another.
- de facto*, Lat. phr. in fact; actually.
- defamation*, n. slanderous or libelous statements injurious to reputation.
- default*, n. omission or failure to fulfill a duty.
- defeasible*, adj. subject to annulment.
- defendant*, n. party against whom an action is brought.
- defendant in error*, n. phr. party against whom an appeal is taken by writ of error, a technical method of removal to a higher court.

- dehors*, prep. outside; foreign to.
- delectus personarum*, Lat. phr. choice of persons.
- delegate*, v. to commit the management of an affair to another.
- delivery*, n. the act of transfer of a sealed or other instrument or property to another.
- demise*, v. to lease or convey. n. lease or conveyance, originally, to take effect after death; also a synonym for death.
- detinue*, n. a form of action for the recovery, in specie, of personal property from one who has acquired possession of it lawfully but retains it without right.
- detriment*, n. loss or harm.
- devise*, n. gift of real property by will.
- dictum*, Lat. n. statement. *obiter dictum*, Lat. phr. collateral statement; statement contained in an opinion which is not necessary to decision of the case.
- dishonor*, v. to decline to accept a bill of exchange or neglect to pay a negotiable instrument at maturity.
- disjunctive*, adj. in the alternative.
- disseisin*, n. dispossession.
- dissolution*, n. breaking up.
- divestiture*, n. termination; the taking away of a right or power.
- dock warrant*, n. certificate of ownership of goods, given by the owner of the dock on which they are stored.
- doctrine of causation*, n. phr. that theory whereby the law limits legal liability to proximate results.
- domicile*, n. that place where a person has or makes his home.
- donee*, n. one to whom a gift is made.
- donor*, n. one who makes a gift.
- dormant*, adj. sleeping; inactive.
- dower*, n. that life estate in lands of her late husband, to which a widow is entitled at common law.
- draft*, n. order for the payment of money.
- drawee*, n. person on whom an order for the payment of money is drawn.
- drawer*, n. person who draws an order for the payment of money.
- duress*, n. unlawful constraint whereby a person is forced to do an act against his will.

E

- earnest*, n. money given to bind a bargain.
- eleemosynary*, adj. charitable.
- eminent domain*, n. phr. the right of a sovereign to take private property for public use.

- entity*, n. that which has an independent existence.
- equitable*, adj. of or pertaining to equity.
- equity*, n. that system of law having its source in the rulings of the chancellors, and applying the legal principles evolved by them.
- escrow*, (*delivery in*), n. delivery to a third person to hold pending the occurrence of a contingency.
- essence*, n. that which is indispensable.
- estoppel*, n. a bar raised by the law on account of a person's prior conduct to preclude him from changing his legal position to the detriment of one who has rightfully relied on such prior conduct.
- et al.*, Lat. phr. (abb. from *et alius*) and another.
- ex*, Lat. prep. out of, from.
- ex æquo et bono*, Lat. phr. in justice and fairness.
- ex contractu*, Lat. phr. arising from a contract.
- execution*, n. carrying into effect; also used to indicate an order of the court directing the enforcement of its judgment.
- executor*, n. a person named by the maker of a will and appointed by the probate court to carry out its provisions. fem., *executrix*.
- ex facie*, Lat. phr. apparent on the surface.
- ex parte*, Lat. phr. by or for one party only.
- express*, adj. explicit; not left to inference or implication.
- ex turpi causa*, Lat. phr. arising out of an illegal and iniquitous state of facts.

F

- fee*, n. absolute ownership (of land).
- felony*, n. crime punishable by death or imprisonment in state's prison.
- feme sole*, Nor. Fr. phr. unmarried woman.
- fiduciary*, n. person in a relationship of trust. adj. in the nature of a trust.
- fi. fa.* (*fieri facias*), Lat. phr. writ of execution commanding a sheriff to levy upon property belonging to a judgment debtor.
- foreign corporation*, n. phr. corporation created by the law of another jurisdiction.
- a fortiori*, Lat. phr. all the more so; by a stronger reason.
- franchise*, n. a special privilege conferred by a governmental body upon an individual or corporation.
- freehold*, n. an estate in land in fee or for life.
- functus officio*, Lat. phr. having fulfilled the purpose.
- futures*, n. options, giving the holder a right to require delivery at a future time, no actual delivery being, as a rule, contemplated.

G

gaming, n. gambling.

good will, n. phr. the benefit accruing to an established business from the likelihood that customers will continue to resort thereto.

grant, n. transfer of title, generally to real property.

grantee, n. person to whom a grant is made.

grantor, n. person who makes a grant.

gratuity, n. gift.

guarantee, v. to promise to answer for the fulfilment of an obligation of another.

guaranty, n. promise to answer for the fulfilment of an obligation of another.

H

hypothecate, v. to make a contract of mortgage or pledge without delivery of the article mortgaged or pledged. n. hypothecation.

I

ignorantia legis neminem excusat, Lat. phr. ignorance of the law excuses no one.

ipso facto, Lat. phr. by the fact itself.

implead, v. to join as defendant in a legal action, generally criminal.

implied, adj. understood; not expressed.

impugn, v. to confute; to discredit.

inception, n. beginning.

incompetent, adj. unfit. n. *incompetency*.

incorporate, v. to form a corporation.

indemnify, v. to secure against loss or damage.

indemnity, n. compensation to one indemnified.

indicia, Lat. pl. n. indications.

indorsement, n. the act of a party in writing his name upon the back of a negotiable instrument, whereby the property therein is transferred to another. *indorsement*, (*accommodation*), the indorsement of a negotiable instrument by a third party for the purpose of lending his credit to a party thereto.

in hæc verba, Lat. phr. in these words.

injunction, n. order issuing from a court of equity requiring a person to do or refrain from doing a particular act.

in pais, (*act in pais*), Nor. Fr. an act which takes place without legal proceedings; a transaction which is neither a matter of record nor under seal.

in pari delicto, Lat. phr. equally in the wrong. *In pari delicto potior est conditio defendentis*, Lat. phr. where each party is equally at fault, the situation of the defendant is the stronger.

in personam, Lat. phr. against the person.

in re, Lat. phr. in the matter of.

in rem, Lat. phr. against the thing.

insolvency, n. the condition of one, the amount of whose liabilities exceeds the value of his assets.

instrument, n. legal document.

inter sese, Lat. phr. among themselves.

intestate, adj. leaving no will. n. a person who dies leaving no will.

in toto, Lat. phr. completely.

J

joint, adj. participated in by two or more as a unit.

joint and several, adj. phr. participated in by two or more, both as a unit and separately.

joint stock company, n. phr. a business organization, having in many respects the form of a corporation, but the legal effect of a partnership.

judgment, n. decision of a court.

judicial sale, n. phr. sale ordered and carried through under authority of a court.

jurisdiction, n. power to hear and determine.

jus disponendi, Lat. phr. right of disposal.

L

laches, n. omission; negligent omission to take appropriate action for the enforcement of one's rights.

latent defect, n. phr. defect not readily discoverable upon inspection.

lease, n. instrument under seal, transferring the right to possession of real or personal property, without transfer of the title.

lessee, n. one to whom a lease is made.

lessor, n. one who makes a lease.

letters testamentary, n. phr. the formal appointment of an executor by a probate court.

levy, n. the act of a sheriff in seizing property to satisfy an execution.

lex mercatoria, Lat. phr. the law merchant; that body of law founded upon the customs of the merchants in vogue during

the Middle Ages upon the Continent of Europe and in England.

lex loci rei sitæ, Lat. phr. law of the place where a thing is.

libel, n. written defamation; also a written statement of the plaintiff's case in divorce or admiralty proceedings.

license, n. permit granted by proper authority.

lien, n. a right to hold the property of another as security for the enforcement of a claim.

life estate, n. phr. an interest in real property, terminating at the death of the owner or another.

limited partnership, n. phr. form of partnership, authorized by statute, whereby the liability of the partners is limited.

locus pœnitentiæ, Lat. phr. opportunity for reconsideration.

locus sigilli, Lat. phr. the place of the seal.

M

mala fides, Lat. phr. bad faith.

malfeasance, n. wrongful or unjust doing of an act which the doer has no right to do.

malum in se, Lat. phr. act inherently wrong.

malum prohibitum, Lat. phr. act prohibited by statute. pl. *mala prohibita*.

mandamus (*writ of*). a writ ordering the doing of a ministerial act by the defendant.

mandate, n. contract by which the management of a business is committed to another.

mandatory, n. one to whom a mandate is given. adj. peremptory.

marital, adj. pertaining to the marriage relation.

market overt, n. phr. public market.

marshalling, part. ranking in order.

maxim, n. principle of law universally admitted.

merger, n. fusion of one right in another.

misfeasance, n. improper performance of an act which the doer may lawfully do.

moiety, n. half.

mortgage, n. a conveyance of real or personal property, whereby the legal title or, in some states, a lien thereon, is conveyed as security subject to avoidance upon performance of the condition named in the instrument.

mortgagee, n. one to whom a mortgage is given.

mortgagor, n. one who gives a mortgage.

mutuality, n. reciprocity of rights.

N

- negligence*, n. failure to exercise the care required by law under the circumstances.
- negotiability*, n. that quality of checks, bills of exchange and promissory notes which makes them transferable from one person to another by indorsement and delivery, or by delivery only.
- negotiable*, adj. having the attribute of negotiability.
- negotium*, Lat. n. business.
- net profit*, n. phr. gain accruing on investment, after deduction of losses and expenses.
- nisi prius (court)*, Lat. phr. court of first instance.
- nominal value*, n. phr. artificial value; value existing in name only.
- nonfeasance*, n. failure to perform an act.
- non-joinder*, n. omission to join a person as a party.
- nonperformance*, n. failure to perform.
- notary*, n. a public officer whose function it is to attest certain classes of legal documents.
- novation*, n. substitution of a new contractual obligation for another.
- noxal action*, n. phr. action for damages done by slaves or irrational animals.
- nudum pactum*, Lat. phr. an undertaking without consideration.
- nugatory*, adj. ineffectual.

O

- obiter dictum*, see dictum.
- obligation*, n. duty to do or to forbear from doing.
- obligee*, n. one in favor of whom an obligation is contracted.
- obligor*, n. one upon whom an obligation rests.
- offeree*, n. one to whom an offer is made.
- offeror*, n. one who makes an offer.
- omnis ratihabitio retrahitur*, Lat. phr. every ratification relates back.
- option*, n. right to purchase or sell at the election of the holder of the option.
- ostensible*, adj. apparent.
- overt*, adj. open.

P

- pari passu*, Lat. phr. with equal step; equally.
- parity*, n. equality.
- particeps criminis*, Lat. phr. accessory to a crime.

- par value*, n. phr. face value (of a security).
- patent defect*, n. phr. defect readily discoverable upon inspection.
- penal*, adj. pertaining to punishment.
- perjury*, n. the giving of wilfully false testimony under oath.
- per my et per tout*, Nor. Fr. phr. by the half and by the whole; the tenure of joint tenants.
- perpetuity*, (*rule against*), n. phr. that provision of the law which requires an estate to vest within the duration of a life in being and twenty-one years thereafter.
- per se*, Lat. phr. by itself; actually.
- plaintiff in error*, n. phr. one who takes an appeal by writ of error. See *defendant in error*.
- plat*, n. map.
- pleading*, n. formal statement of allegations filed in an action.
- pooling*, n. an agreement between competitors for the joint operation of their business, or for a pro rata distribution of their profits.
- positive law*, n. phr. law authoritatively imposed.
- precedent*, n. adjudication having the force of authority in similar cases. adj. going before. *condition precedent*, n. phr. a condition upon the occurrence of which an obligation becomes enforceable.
- preference*, n. advantage which one creditor obtains over another creditor in connection with the satisfaction of his claims from the property of a bankrupt.
- privity*, n. one having a mutual interest in the same subject matter with another. adj., having a mutual interest.
- privity*, n. mutuality of interest.
- probate*, adj. pertaining to the administration of the estate or will of a deceased person. *probate court*, n. phr. court having jurisdiction over probate matters.
- pro rata*, Lat. phr. proportionately.
- prosecution*, n. proceedings brought by the sovereign for punishment of a crime.
- pro tanto*, Lat. phr. to that extent.

Q

- qua*, Lat. pron. considered as.
- quantum meruit*, Lat. phr. as much as it deserved; used to indicate a form of action in which the plaintiff seeks to recover the value of services rendered.
- quantum valebant*, Lat. phr. as much as they were worth; used to indicate a form of action in which the plaintiff seeks to recover the value of materials furnished.

quasi contract, n. plur. a form of obligation analogous to that of contract in which the element of agreement is supplied by law.

quasi public, adj. phr. as if public; having public functions.

qui facit per alium facit per se, Lat. phr. he who acts through another, acts himself.

quoad, Lat. conj. as to.

quo warranto, Lat. phr. a proceeding by a sovereign to inquire by what authority an alleged right is exercised.

R

ratification, n. adoption of the act of another as one's own.

realty, n. real estate.

recoup, v. to offset.

recourse, (*indorsement without*), n. that form of indorsement whereby the indorser signifies his refusal to assume responsibility for the payment of a negotiable instrument.

referee, n. an officer appointed by the court for the hearing of a case.

remainderman, n. phr. one having a right to land upon the termination of a prior estate.

replevy, v. to bring an action (known as *replevin*) to recover possession of personal property unlawfully detained.

repudiate, v. to reject.

res, Lat. n. thing.

resile, v. to withdraw.

rescission, n. abrogation.

respondcat superior, Lat. phr. let the master answer.

respondent, n. defendant in an equity case.

S

scienter, adv. knowingly; often used as a noun to indicate knowledge.

seal, n. an impression upon wax or other substance used in certain forms of instruments to indicate the solemn assent of a party thereto. At the present time, the seal may, in many jurisdictions, be no more than a scroll.

seized (*seised*), p.p. possessed.

service of process, n. phr. delivery of a writ or other legal document by an authorized person for the purpose of giving official notice.

set-off, (*right of*), n. the right to enforce a countervailing claim against the other party to a suit.

- simul cum*, Lat. phr. at the same time with; used when additional parties are joined in an action.
- simulacrum*, n. image.
- socii*, Lat. partners.
- solvent*, adj. having an excess of assets over liabilities.
- specialty*, n. a contract under seal.
- specie*, (*in*), adj. phr. in coin; as applied to things, used to indicate identity.
- specific performance*, n. phr. literal execution of the terms of a contract ordered in certain cases by a court of equity.
- stare decisis*, (*doctrine of*), n. phr. that theory of law by which courts consider themselves bound to follow precedents.
- statu quo*, (*in*), Lat. phr. in the condition existing at a fixed prior time.
- statute*, n. legislative enactment.
- statute of frauds*, n. phr. that statute, originally English, which requires certain contracts to be evidenced in a specified way, generally in writing.
- statute of limitations*, n. phr. that statute which fixes the length of time within which suit must be brought upon a given cause of action.
- stoppage in transitu*, n. phr. the act by which an unpaid vendor stops the process of delivery of goods and resumes possession of them.
- subsequent*, (*condition*), adj. a condition referring to a future event, upon the occurrence of which a contractual obligation becomes no longer binding upon a party who chooses to avail himself of the condition.
- substantive law*, n. phr. that body of law which creates, defines and regulates rights; to be distinguished from adjective law, which prescribes the method of enforcing rights.
- sui generis*, Lat. phr. of its own kind.
- sui juris*, Lat. phr. of legal competency.
- suo vigore*, Lat. phr. of its own force.
- supra*, Lat. above referred to; over. *supra protest*, after protest.
- surplusage*, n. unnecessary matter.

T

- tantamount*, adj. equivalent.
- tender*, n. offer to perform.
- terminum*, Lat. limit; used to indicate the final day, upon which a defendant must appear or answer.
- testator*, n. a man who makes a will; fem. *testatrix*.
- title (to property)*, n. general ownership.

- tort*, n. a civil wrong, not arising out of a breach of contract or a breach of trust.
- tortfeasor*, n. phr. one who commits a tort.
- tortious*, adj. wrongful.
- trespass*, n. an unjustified invasion of the rights of a person, generally to property.
- trover*, n. an action for damages arising out of the wrongful exercise of dominion over property of another.
- trust*, n. a holding of property subject to a duty to employ it or to apply its proceeds in accordance with directions given by the person from whom it was received.
- trustee*, n. one whose duty it is to administer a trust.
- turpitude*, n. baseness.

U

- ultra vires*, Lat. phr. beyond the powers.
- unilateral (contract)*, adj. a contract in which the obligation exists on one side only.
- usury*, n. agreement for a rate of interest greater than that allowed by law.
- utile per inutile non vitiatur*, Lat. phr. that which is valid is not rendered invalid by the incidental addition of invalid matter.

V

- valid*, adj. legally enforceable.
- validity*, n. legal enforceability.
- vendee*, n. purchaser.
- vendor*, n. seller.
- vendor's lien*, n. phr. the right of a seller to retain possession of property sold as security for the payment of the price.
- virtute officii*, Lat. phr. by virtue of his office.
- vitiate*, v. to render nugatory.
- void*, adj. having no legal effect.
- voidable*, adj. potentially of no legal effect.
- voucher*, n. receipt or release.

W

- waive*, v. to relinquish a right to enforce.
- warrant*, v. to guarantee; n. a legal instrument directed to a person in authority authorizing him to perform a certain act; also a form of receipt.
- watered stock*, n. phr. stock issued without corresponding increase of actual value.
- writ*, n. a precept in writing, issuing from a court of justice, requiring the appearance of a party or the doing of an act.

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